Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

KWANZA MARTINEZ,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the evidence produced at trial was sufficient to sustain a conviction for Kidnapping with the Intent to Commit Rape where the Appellant asked the complaining witness to have sex and, when she declined, he voluntarily left the area without attempting to have any sexual contact with her, and where the government failed to prove Appellant used threat or force to accomplish the kidnapping?

2. Whether the trial court erred in failing to instruct the jury that the government needed to prove Appellant used "force or threat" to kidnap the alleged victim?

3. Whether the prosecutor engaged in reversible misconduct in repeatedly questioning Appellant regarding his post-arrest, post-*Miranda* silence in deprivation of his Fifth Amendment right against self-incrimination? This issue was raised and discussed at 79a-80a.

4. Whether the trial court committed reversible error in permitting the government to introduce irrelevant and highly prejudicial hearsay evidence? This issue was raised and discussed at 100a-110a, 135a-136a.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

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OPINIONS BELOW

The opinion of the Court of Appeals has been published. (Appendix A). The opinion of the District Court of the Virgin Islands was not published. (Appendix B and C).

JURISDICTIONAL STATEMENT

Kwanza Martinez was convicted in the Territorial Court of the Virgin Islands of kidnapping for rape, and he was sentenced to thirty years in prison. (Appendix D.) The Appellate Division of the District Court of the Virgin Islands affirmed the conviction. (Appendix B and C.) Three months later, Martinez filed a notice of appeal to the United States Court of Appeals for the Third Circuit. The United States Court of Appeals for the Third Circuit affirmed the order of the Appellate Division on September 8, 2010. (Appendix A.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 4 V.I.C. Section 33, 4 V.I.C. Section 76, 14 V.I.C. Section 1052(b), 14 V.I.C. Section 1700(c), 14 V.I.C. Section 1700a(a), 28 U.S.C. Section 1291 and 48 U.S.C. Section 1613a(a). (*See* Appendix E.)

STATEMENT OF THE CASE

A. INTRODUCTION

The Government of the Virgin Islands alleged that on or about June 16, 2003, in St. Croix, Petitioner kidnapped Chenae Harvey and then sexually assaulted her. In its Amended Information the Government charged Petitioner with Aggravated Rape in the First Degree at Court I, in violation of 14 V.I.C. Section 1700(c), Aggravated Rape in the Second Degree at Count II in violation of 14 V.I.C. Section 1700a(a), Kidnapping for Rape at Count III in violation of 14 V.I.C. Section 1052(b), Possession of a Deadly or Dangerous Weapon during the Commission of a Crime of Violence at Count IV in violation of 14 V.I.C. Section 2255(a)(2)(B), and two counts of Unlawful Sexual Contact in the First Degree at Counts V and VI, in violation of 14 V.I.C. Section 1708(4). *Government of the Virgin Islands v. Kwanza Martinez,* Criminal No. F228/03, Superior Court of the Virgin Islands, Division of St. Croix. (72a). On April 28, 2004, the parties selected a jury and proceeded to trial. The Honorable Judge Edgar D. Ross (now retired) presided over the trial.

After a three day trial the jury deliberated and acquitted Petitioner of Counts I, IV, V and VI. (170a-172a). The trial court had previously dismissed the charge of Rape in the Second Degree at Count II. The jury rendered a verdict of guilty on Count III (kidnapping for Rape). On August 20, 2004, the trial court sentenced Petitioner to a term of thirty (30) years incarceration, with credit for time served. (69a).

Petitioner filed a timely appeal from the Judgment and sentence to the Appellate Division of the District Court of the Virgin Islands. (76a). The Appellate Division affirmed the decision and verdict of the Superior Court. (46a-68a).

B. STATEMENT OF THE FACTS

Petitioner and Chenae Harvey are first cousins. According to the Government, on June 16, 2003, Chenae Harvey was at home on St. Croix. While at her home she voluntarily got into a vehicle driven by Petitioner. (82a-90a). Ms. Harvey testified that she wanted to go to her friend's home in Harbor View. She claimed that Petitioner would not take her to her friend's home and the he continued to drive until they reached the Salt River "side." (90a-91a). Petitioner then continued up the "beast" hill and turned his vehicle around. Petitioner then allegedly asked Ms. Harvey to have sex, which she declined. Petitioner then told Ms. Harvey to get out the car, which she did. (91a-92a).

Petitioner then left the area and returned approximately five minutes later. Ms. Harvey testified that, in fact, she was "so happy" that Petitioner returned. (92a-93a).

Ms. Harvey testified that she opened the door to get back into the car but Petitioner took her by the hand and pulled her out of the car and the two had an altercation. According to Ms. Harvey, Petitioner told her that she needed to take down her underwear and pants and she complied. He then told her to bend over and he placed a condom on and began to have vaginal and oral sex with her (92a-95a). Ms. Harvey then

voluntarily re-entered the vehicle and the two then drove off together.

Petitioner then allegedly told Ms. Harvey he would shoot her if she told anyone they had sex. She claimed that Petitioner had a gun in his possession during the incident. The two then drove back to Ms. Harvey's home and she went inside alone. Ms. Harvey did not make any allegations of rape against Petitioner for at least two days.

In a blatant attempt to garner sympathy from the jury, Ms. Harvey wore her high school uniform to court, even though school was in recess for Carnival at the time of her testimony. (120a-121a).

Ms. Harvey admitted on cross-examination that she lied on numerous occasions about the alleged rape during her initial interviews with police, and that many of her allegations against Petitioner were being uttered for the first time at trial, or that she failed to reveal them to the authorities until just before trial. (123a-124a).

Petitioner testified in his own defense. He described the events of June 16, 2003 very different from Ms. Harvey, who admitted to lying to the police about the incident. Petitioner informed the jury that Ms. Harvey asked him for money ($500-$600) on the day of the incident. He told her he did not have much money. Ms. Harvey then asked Petitioner to pick her up later that night, which he did. (144a-145a). The two had consensual sexual relations after which Ms. Harvey told Petitioner that she would make a false assertion of rape against him if he did not give her the money she demanded. (147a-149a).

At the close of the Government's case, the trial court dismissed Count II, Aggravated Rape in the Second Degree. After the close of all the evidence, the jury found Petitioner guilty on Count III, and acquitted him of all other counts.

C. JURISDICTION BELOW

Jurisdiction in the Superior Court was pursuant to 4 V.I. Code § 76. Jurisdiction in the District Court was pursuant to 4 V.I. Code § 33.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT MUST REVERSE PETITIONER'S CONVICTION FOR KIDNAPPING WITH INTENT TO COMMIT RAPE WHERE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION AS A MATTER OF LAW

A. Insufficiency of the Evidence.

The Virgin Islands Legislature has defined Kidnapping for Rape, in pertinent part, as follows:

> Section 1052. **Kidnapping for ransom, extortion, robbery or rape**
>
> * * *
>
> (b) Whoever abducts takes or carries away any person by force or threat with the intent to commit rape is guilty of kidnapping and shall be imprisoned for not less than 15 years and shall not be

> eligible for parole until he has served at least one-half of sentence imposed.

To sustain a conviction for Kidnapping for Rape the government must have proven beyond a reasonable doubt that 1) the defendant; 2) knowingly and intentionally and unlawfully 3) abducted, took or carried away the victim, 4) by force or threat, 5) with the specific intent to commit rape. In addition, the government was required to prove that the kidnapping was a significant duration and that the kidnapping created a significant danger to the victim, independent and different from the alleged rape. (168a-169a).

In *Government of the Virgin Islands v. Berry,* 604 F.2d 221 (3d Cir. 1979), the Third Circuit dealt with a scenario where the Petitioner had driven the victim to a pond, made him undress (perhaps at point of shotgun) and told the victim to pay him the drug money he owed to Petitioner by the next day or he would be killed. As in this case, the victim had voluntarily entered the car with the Petitioner. *Id,* at 223. A jury convicted the Petitioner of kidnapping and robbery under the Virgin Islands law.

On appeal, the Petitioner asserted that the evidence at trial was insufficient to convict him of kidnapping. The Third Circuit Court of Appeals voiced its concern about the overuse of kidnapping statutes where the asportation or removal of the person was ancillary to the underlying offense. *Id.,* at 226. Otherwise, the Court feared "the boundaries of potential liabilities would be lost for infinity." *Id.* quoting *Chatwin v. United States,* 326 U.S. 455 (1946) (emphasis in original).

In order to quell the potential for abuse of the Virgin Islands kidnapping statutes, the Court instructed future trial courts to look at four factors when ascertaining the sufficiency of conviction for kidnapping. "The factors are: 1) the duration of the detention or asportation; 2) whether the detention or asportation occurred during the commission of another offense; 3) whether the detention or asportation which occurred is inherent in the separate offense; and 4) whether the detention or asportation created a significant danger to the victim independent of that posed by the separate offense. *Id.* at 227.

Looking at the evidence in the light most favorable to the government on appeal, the Third Circuit Court of Appeals concluded that while the petitioner and his accomplice committed a robbery, assault and possibly committed attempted extortion, the confinement occurred during the commission of those offenses, and was no greater than that which was inherent in the commission of those offenses. The Court concluded some limited asportation or confinement is necessary to complete those crimes. Finally, the Court concluded the short ride to the pond was insufficient for kidnapping and that the victim's asportation and confinement created no appreciable increased risk of injury for the victim, even though they left him alone and naked at the pond. *Id.* at 228-29.

Instantly, the record is devoid of evidence, even viewed in the light most favorable to the government, to sustain Petitioner's conviction for Kidnapping for Rape under 14 V.I.C. Section 1052(b). Quite specifically, the government contended that Petitioner did "unlawfully carry away C.H., a minor, by force or threat, with the intent to commit rape, to wit, by

taking her from Harbor View Apartments to a deserted location in the Salt River Area, Scenic Route Road for the purpose of raping her . . ." (72a-73a).

The evidence adduced at trial, however, revealed that while in the Harbor View area Chenae Harvey voluntarily entered the vehicle with Petitioner and it was she who wanted to go with Petitioner. (147a-149a). When they reached the Salt River Petitioner then allegedly asked Ms. Harvey to have sex with him. (152a). When she said no he then left her in the area. (153a). When Petitioner returned Ms. Harvey again voluntarily got back into his vehicle. After she re-entered the vehicle, Ms. Harvey admitted that Petitioner never took or carried her anywhere in the vehicle at that point. Ms. Harvey then said Petitioner got out of the car and the two had a physical fight. It was after that fight that she alleged Petitioner raped her. The jury, however, acquitted Petitioner of any other criminal action. (169a-172a). Ms. Harvey then voluntarily re-entered the vehicle and the two drove home where Petitioner then dropped Ms. Harvey at her home. (92a-101a).

Initially, as a matter of law, Petitioner did not rape or in anyway, sexually assault Ms. Harvey. While the government is entitled to have the facts viewed in the light most favorable to them on the Kidnapping or Rape conviction, the jury and the trial court had already spoken on the remaining charges in this case and concluded that no other crime was committed as a matter of law. Therefore, no rape or other sexual misconduct can be considered on appeal as having occurred.

Indeed, at no point during this case did the government show that Petitioner ever used force, threat of force to abduct, take, or carry away Ms. Harvey. The entire record is entirely devoid of such proof. She entered the car voluntarily each and every time she was in the car. The government contended that the "Kidnapping for Rape" occurred when Petitioner took Ms. Harvey from Harbor View to the Salt River. (Count Three). The specific intent to commit rape then must have been manifested by Petitioner when he took her to the Salt River area. The evidence at trial, however, illustrated that Petitioner, after requesting sex from Ms. Harvey, left Ms. Harvey alone and left the area entirely and returned approximately five minutes later. Such actions at most, show that any intent to rape occurred well after the initial trip to Salt River. It is undisputed, however, that the two had sex and that the jury concluded that no rape or other sexual misconduct occurred. Thus, the fact that the two had sex cannot be a basis for concluding that Petitioner ever manifested specific intent to rape Ms. Harvey. *See Government of the Virgin Islands v. Isaac*, 50 F.3d 1175, 1179 (3d Cir. 1995); *Government of the Virgin Islands v. Adams-Tutein*, 2005 U.S. Dist. LEXIS 14064 (D.V.I. 2005).

Likewise, the actions allegedly taken by Petitioner after he returned to the Salt River are insufficient to prove Kidnapping for Rape. The government charged that the kidnapping for rape occurred between Harbor View and the Salt River. Once, again, no abduction took place as Ms. Harvey again voluntarily got into the car. Any actions taken in regards to her removal from the vehicle and the altercation that happened afterwards does not constitute kidnapping for rape.

During an altercation there is bound to be some minimal asportation or detention. Any such asportation or detention was ancillary to the other crimes alleged by the government. In this case, such detention was minimal in scope and duration and did not expose Ms. Harvey to any additional significant dangers. Any argument to the contrary would call for pure speculation as no evidence regarding additional significant danger was ever presented at trial. *See Berry, supra.* (In *Berry*, the assailants actually left the victim alone at the pond and the Court concluded that fact alone was insufficient as a matter of law. Petitioner drove Ms. Harvey back to her doorstep).

As the Government failed to produce sufficient evidence to show that any threat or force was ever used against Ms. Harvey, and failed to show that Petitioner ever manifested a specific intent to rape Ms. Harvey before or during the ride to the Salt River, the Government completely failed to sustain it burden of proof beyond a reasonable doubt.

In addition, the *Berry* factors must compel this Court to further conclude that the facts of the case are insufficient to maintain Petitioner's conviction for kidnapping for rape. Thus, the trial court erred in sustaining this conviction, and the Appellate Division of the District Court erred in affirming the conviction.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO PROPERLY INSTRUCT THE JURY ON THE STATUTORY ELEMENTS OF KIDNAPPING WITH THE INTENT TO COMMIT RAPE

It is axiomatic that the charge to the jury must be considered as a whole. *United States v. Lemire,* 720 F.2d 1327, 1340 (D.C. Cir. 1983). Jury instructions are not erroneous if, when viewed as a whole, they fairly present the applicable legal principles and standards. *Joy v. Bell Helicopter Textron, Inc.,* 999 F.2d 549, 556 (D.C. Cir. 1993).

An analysis of jury instructions claimed to impair a constitutional right "must focus initially on the specific language challenged." *Francis v. Franklin,* 471 U.S. 307, 315, 105 S. Ct. 1965, 1971 (1985); *see also Rock v. Zimmerman,* 959 F.2d 1237, 1246 (3d Cir. 1992)(en banc). The allegedly constitutionally infirm language must be considered in the context of the charge as a whole. *See Estelle v. McGuire,* 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991); *Flamer v. Delaware,* 68 F.3d 736, 752 (3d Cir. 1995); *Kontakis v. Beyer,* 19 F.3d 110, 115-16 (3d Cir. 1994). The proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." *Estelle,* 502 U.S. at 72, 112 S. Ct. at 482 (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198 (1990)) (emphasis added): *see also Victoria v. Nebraska,* 511 U.S. 1, 6, 114 S. Ct. 1239, 1243 (1994).

An instruction which eliminates, alters, or negates an element of an offense is violative of a defendant's

due process rights, and a conviction based on such an instruction cannot stand. As this Court has explained:

> It is well-settled that "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970); [ ] *Sandstrom v. Montana,* 442 U.S. 510, 520-22, 99 S.Ct. 2450, 2457-58 (1979). A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due process rights. *See Carella v. California,* 491 U.S. 263, 265, 109 S.Ct. 2419, 2420 (1989) (per curiam).

Smith v. Horn, 120 F.3d 400, 411-15 (3d Cir. 1997) (other citations omitted).

"When a party has made a timely objection to jury instructions, [a reviewing court will generally review for abuse of discretion. In the absence of a timely objection, [the Court will] review only for plain error. Under the latter standard, only those errors that undermine the fundamental fairness of the trial and contribute to a miscarriage of justice will be reversed." *Government of the Virgin Islands v. Fonseca*, 274 F.3d 760, 765 (3d Cir. 2001). The "plain error" standard derives from the Federal Rules of Criminal Procedure, which provides that "plain errors or defects affecting substantial rights may be noticed although they were

not brought to the attention of the court." Fed. R. Crim. P. 52(b). An error "affect[s] substantial rights" if the error was prejudicial to the defendant and affected the outcome of the trial. *United States v. Olano,* 507 U.S. 725, 731-32, 113 S. Ct. 1770 (1993).

Once "plain error' is found the appellate court has the discretion to correct the error if "the error seriously affects the fairness, integrity or public reputation of the proceedings." *Government of the Virgin Islands v. Mujahidin*, 990 F.2d 111, 116 (3d Cir. 1993) (quoting *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038 (1985)).

Further, this Court has stated:

> There is not rigid test for determining plain error. We consider on a case-by-case basis such factors as "the obviousness of the error, the significance of the interest protected by the rule that was violated, the seriousness of the error in the particular case, and the reputation of judicial proceedings if the error stands uncorrected – all with an eye toward preventing manifest injustice."

Mujahidin, supra at 116.

The "plain error' doctrine contained in Fed. R. Crim. P. 52(b) is applicable to cases on appeal from the Superior Court of the Virgin Islands. *Rosa v. Government of the Virgin Islands,* 307 F. Supp. 2d 695 (D.V.I. 2004).

Before one can be convicted of kidnapping for rape, the Government must prove that 1) the defendant; 2)

knowingly and intentionally and unlawfully, 3) abducted, took or carried away the victim, 4) by force or threat, and 5) with the specific intent to commit rape.

In its final instruction to the jury, the trial court instructed the jury as follows in regard to the kidnapping for Rape charge:

> [Court]: The Defendant, Kwanza Martinez, is charged in Count 3 of the Information with rape. Under the laws of the Virgin Islands, it is an offense or a crime to abduct, take or carry away any person by force or threat with the intent to commit rape.
> Therefore, before you may find the defendant guilty of kidnapping for rape as charged in Count 3, you must find that the government has proven each of the following elements beyond a reasonable doubt: That the defendant and not other person, did knowingly and intentionally and unlawfully abduct, take or carry away Chenae Harvey; that the defendant acted with a specific intent to commit rape; that these acts occurred on or about June 16, 2003 in St. Croix, United States Virgin Islands. (167a-168a).

While the court mentioned that the offense involved the requirement that a "force or threat" (166a-169a) be used in a kidnapping, when explaining the elements of the offense, the court specifically excluded the

requirement that the government prove that Petitioner use any force or threat to accomplish the kidnapping. In listing the elements of the offense, the trial court failed to instruct the jury on an essential element of the offense. The court's failure to instruct the jury of the government's burden to prove the use of either force or threat was an error of constitutional dimension in that it relieved the government of its obligation to prove an element of the offenses beyond a reasonable doubt. The court's failure to list "force or threat" as one of the elements was highly prejudicial to Petitioner. The fact of the case clearly illustrated that Ms. Harvey voluntarily got into Petitioner's car and went for a ride with him without force or threat. Her voluntary entry into the car is undisputed. All other counts had been dismissed or the jury had acquitted Petitioner on all other counts except Count Three.

The faulty instruction constituted plain error in that it allowed a manifest injustice and affects the fairness and integrity of the trial (due process violation and allows for conviction on less than prove of guilt on all elements beyond a reasonable doubt).

Accordingly, this Court must vacate the conviction and remand for a new trial.

III. THE PROSECUTOR REPEATEDLY ENGAGED IN MISCONDUCT BY QUESTIONING PETITIONER ABOUT HIS POST-ARREST POST-*MIRANDA* SILENCE

The oft repeated phrase "You have the right to remain silent" is rendered illusory and violates a defendant's rights to Due Process where the prosecutor in his naked zeal to obtain a conviction, uses a

defendant's exercise of that right to remain silent to impeach the defendant. That violation is compounded when neither the court, nor defense counsel, steps in to protect the defendant's rights. In this case, the prosecutor repeatedly attacked the Petitioner for failing to assert his claim to police following his post-*Miranda*, post-arrest, incarceration.

The Fifth Circuit Court of Appeals has noted:

> The United States Supreme Court in *Doyle v. Ohio,* 426 U.S. 610 (1976), held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." Where prosecutorial comments are 'designed to draw meaning from silence,'[ ] they remain subject to the rule in *Doyle.* In other words, **prosecutorial statements that are either intended to or have the necessary effect of raising a negative inference simply because of the defendant's exercise of his rights to remain silent are prohibited."**

Pitts v. Anderson, 122 F.3d 275, 280 (5th Cir. 1997) (emphasis added), citing *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 2182 (1980) (per curiam); *Doyle, supra.*

The Pennsylvania Superior Court recently noted:

> In the seminal case of Doyle v. Ohio, the U.S. Supreme Court determined that prosecutorial comment at trial on the defendant's post-*Miranda* silence may violate due process, and

> that the prosecution generally may not impeach a testifying defendant with the fact of his post-*Miranda* silence. The Court reasoned that it would be fundamentally unfair and a deprivation of due process to prove Miranda warnings, which imply that silence care no penalty, and then allow the defendant's post-*Miranda* silence to be used by the prosecution as impeachment at trial. In addition, the Court noted, when silence follows upon issuance of Miranda warning, it may be a result of an exercise of *Miranda* rights (rather than, for example, a tacit admission); such silence, therefore, is "insolubly ambiguous."

Commonwealth v. Spotz, 870 A.2d 822, 830-831(Pa. 2005).

As the Seventh Circuit also accurately stated:

> Where a defendant claims self-defense at trial, it would be a violation of *Doyle* for the state to point out that the defendant, after receiving *Miranda* warning, did not tell the police officers that he had acted in self-defense, and use that to infer that defendant had indeed not acted in self-defense. In [*United States ex rel.*] *Allen* [v. *Franzen*], 659 F.2d 745 (7th Cir. 1981), we found unconstitutional the prosecutor's use of defendant's post-*Miranda* silence in failing to tell police officers he had acted in self-defense in shooting his wife as evidence that defendant did not act in self-defense.

Grancorvitz v. Franklin, 890 F.2d 34, 44 (7th Cir. 1989).

Petitioner took the stand and testified in his own defense. On direct examination, Petitioner explained that Ms. Harvey had demanded money from him and had threatened to accuse him of sexual misconduct if he did not get her the money. On cross-examination, the following exchange took place:

[Prosecutor]:	Did you tell Ms. Martinez that Chenae might be in some trouble and needed 5 to $600?
[Appellant]:	No, sir.
[Prosecutor]:	Did you tell your mother that Chenae demanded 5 or $600 from you?
[Defense Counsel]:	Objection, your honor.
[The Court]:	Overruled.
[Prosecutor]:	Did you tell your mother that Chenae was trying to shake you down for 5 or $600?
[Defense Counsel]:	Objection as to shake down.
[The Court]:	Sustain.
[Prosecutor]:	Did you tell anyone other than today that

Chenae demanded 5 or $600 from you?

[Defense Counsel]: Objection, your honor.

[The Court]: Overrule.

Defense counsel then moved for a side bar at which he objected to the line of questioning because it violated Petitioner's right to remain silent. The court overruled defense counsel's objection and permitted the line of questioning. In fact the trial court conceded that Petitioner "has a right not to say anything to anyone," but then continued, "but they can ask him if he said it." (160a-163a). Defense counsel in a last attempt to make the government curtail its questioning to the pre-Miranda period, asked the trial court to limit the questions to a specific time frame. The court refused and the prosecutor again asked Petitioner if he had ever "told anyone." (159a-164a). In closing, the prosecution repeatedly mocked Petitioner's version of events using his silence to impeach his credibility. (164a-166a).

The prosecutor's questions contained no limiting language as to time whatsoever. As a practical and linguistic matter, the questions regarding whether Petitioner had told anyone about Ms. Harvey's demand for money covered the period from the incident up until the very second the questions were being asked. As a matter of law, the questions covered the pre-arrest, pre-Miranda period through the post-arrest, post-Miranda period, through his advisement of rights by the trial court, through arraignment, and all the way up until that very second at trial.

Where a prosecutor seeks to tread on one's right to remain silent, he must treat lightly, and must keep a sharp and keen eye to tread only where permissible.

This is not a case where Appellant took the stand and told the jury he had previously told the same story to the police or other persons. *See Hassine v. Zimmerman,* 160 F.3d 941 (3d Cir. 1998). Here, the prosecutor's line of inquiry was intended to and/or had the necessary effect of raising a negative inference simply because Petitioner exercise his right to remain silent. The only purpose in using this line of questioning was, indeed, to cast doubt on Petitioner's credibility. Prosecutorial abuse of this sacred right is pandemic. It is the obligation of the Court to quell its continued deleterious effect by letting the prosecution know that such misconduct will no longer be tolerated, lest our system of justice become no better than Stalinist show trial.

Because the prosecution violated Petitioner's rights under the circumstances, and the trial court committed reversible error by allowing the prosecution to do so over Petitioner's objection, this Court should vacate the conviction and remand for a new trial.

IV. THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO BOLSTER THE TESTIMONY OF ITS COMPLAINING WITNESS THROUGH THE USE OF IRRELEVANT HEARSAY EVIDENCE

Relevant evidence is generally admissible unless precluded by some other rule or law. Fed. R. Evid. 402. Only relevant evidence is admissible at trial. *Id.*

"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

Hearsay is defined as "a statement, other than one made by the declaring witness while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay statements are inadmissible at trial unless permitted by some other law or rule. Fed. R. Evid. 802. The question of whether a statement constitutes hearsay is one of law, and thus subject to plenary review by the appellate court. *See United States v. Sallins,* 993 F.2d 344, 346 (3d Cir. 1993), *cert. denied,* 523 U.S. 1096, 118 S. Ct. 1581 (1998); *United States v. McGlory,* 968 F.2d 309, 332 (3d Cir. 1992). Statements offered for a reason other than the truth do not constitute hearsay.

An oblique narrative occurs when one party relates to a jury what he or she did in response to another party's statement, or what someone did in response to the witness's statement. Such testimony is an end-run around the hearsay prohibition and is likewise prohibited. *See Commonwealth v. Dent,* 2003 PA Super 457, P12 (Pa. Super. Ct. 2003) (explaining that oblique narratives constitute inadmissible hearsay and violate a defendant's right to confront witnesses against him).

The Federal Rules of Evidence dictate that certain statements, though they might otherwise qualify as hearsay, are to be considered exceptions to the hearsay rule, and are admissible as long as they are not excluded by another rule. Fed. R. Evid. 803. One such rule is the "excited utterance" exception to the hearsay

rules. Fed. R. Evid. 803(2). An "excited utterance" is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Id. *See also United States v. Brown,* 254 F.3d 454, 458 (3d Cir. 2001), *cert. denied*, 535 U.S. 944, 122 S. Ct. 1332 (2002).

While Fed. R. Evid. 803(2) does not require the "excited utterance" to be made contemporaneously with the startling event or condition, it does require that the statement be made with the excitement of the event. *Id.*, at 460. However, "common sense suggests that the lapse of time and change of scene is relevant to determining the extent to which a statement is spontaneous or the result of deliberation." *United States v. Lawrence,* 349 F.3d 109, 119 (3d Cir. 2003).

During direct examination, Ms. Harvey was asked when was the first time she told anyone about the alleged incident. (101a-104a). Over defense counsel's objections, the court permitted Ms. Harvey to testify that she told her brother about the incident "two days later." Ms. Harvey was then permitted to testify that she talked to her mother and as a result of that conversation, she was taken to the hospital. (103a-104a). Defense counsel objected to the prosecution's inquiry into Ms. Harvey's conversation with her sister. Defense counsel asserted that hearsay can be derived from actions as well as words. The trial court overruled the objections and Ms. Harvey was allowed to testify as to her actions after the conversation with her sister, including the fact that she went to the hospital for treatment where two officers were waiting to take her statement. (104a-111a).

Later, during the trial, Chenae Harvey's mother was able to later bolster this testimony by explaining that after her conversation with Ms. Harvey she went to Harbor View Apartments to take her daughter to the hospital, and then went with the police to help them collect evidence. (135a-139a).

The entire context of the aforementioned line of inquiry was riddled with hearsay. Although the direct out of court statements were not used, the prosecution and the court combined to violate the hearsay prohibition by an end-run around it. What as clear to any listener is that Ms. Harvey told her brother, sister and mother that she had been raped and that she was taken to the hospital as a result of those claims. In addition, the jury was informed that the police were waiting at the hospital to take Ms. Harvey's statement and that as a result of those statements, Ms. Williams, the prosecutor, went to assist the police in collecting evidence from the crime. This testimony was a flagrant violation of the hearsay prohibition through the use of oblique narrative. See *Dent, supra.*

Additionally, any assertion that this evidence constituted an "excited utterance is incorrect as a matter of law. To maintain that these statements are such an exception to the hearsay rule, the prosecution would have to prove, among other things, that the statement was a "statement made before there has been time to reflect and fabricate." *See Brown, supra; Lawrence, supra.* Here, at least two days had passed since the alleged event. That left Ms. Harvey sufficient time to reflect and fabricate details of the story. In addition, the trial court permitted into evidence Ms. Harvey's statements (through oblique

narrative) to her mother, brother, sister, and the police.

Even if this Court finds that her statements to her brother constituted an "excited utterance" to permit the extension of that exception to the 2nd, 3rd, and even 4th party to hear the allegations is an unwarranted extension of that which is supposed to be an exception to the hearsay prohibition.

In allowing the almost endless use of hearsay to bolster the allegations of Ms. Harvey, the trial court erred as a matter of law and deprived Petitioner of his right to a fair trial. Accordingly, this Court should grant Petitioner's writ of certiorari.

CONCLUSION

For the reasons stated in Argument I herein, Petitioner's conviction should be reversed and the Information against him should be dismissed with prejudice. For the reason stated in Arguments II, III and IV, Appellant's conviction should be reversed and the case remanded to the trial court for further proceedings.

Respectfully submitted,

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December 7, 2010

APPENDIX

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2694

[Filed September 8, 2010]

GOVERNMENT OF THE VIRGIN ISLANDS)
)
v.)
)
KWANZA MARTINEZ,)
)
Appellant)

On Appeal from the District Court
of the Virgin Islands, Appellate Division
(Crim. No. 1:04-cr-00148-1)
Judges: Hon. Curtis V. Gomez, Hon. Raymond L. Finch, and Hon. Audrey L. Thomas

Submitted Under Third Circuit LAR 34.1(a)
May 4, 2010

Before: SMITH, CHAGARES, and JORDAN, Circuit Judges.

(Filed: September 8, 2010)

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OPINION

CHAGARES, Circuit Judge.

Kwanza Martinez was convicted in the Territorial Court of the Virgin Islands of kidnapping for rape, and he was sentenced to thirty years in prison. The Appellate Division of the District Court of the Virgin Islands affirmed the conviction. Three months later, Martinez filed a notice of appeal in this Court. Concluding that the Government has forfeited its ability to attack the appeal as untimely pursuant to Federal Rule of Appellate Procedure 4(b), we exercise jurisdiction. Because we reject Martinez's claims on the merits, we will affirm the order of the Appellate Division.

I.

Taken in the light most favorable to the Government, the pertinent facts are as follows. On the

night of June 16, 2003, Chenae Harvey, who was then sixteen, left her home in the Harbor View housing community on the island of St. Croix. In a nearby parking lot, she bumped into Martinez, her first cousin, who was then twenty-one. Harvey entered Martinez's car voluntarily, expecting that he would drive her to her friend Amanda's apartment, also located in Harbor View. Instead, Martinez unexpectedly passed Amanda's apartment at a high rate of speed, and Harvey quickly realized that he did not intend to take her there. Harvey asked Martinez where he was taking her, but he did not answer. She twice asked him to take her home, but again he was unresponsive. When they reached the Princesse area, Harvey began to cry, and screamed to Martinez that she wanted to go home. Yet again, he did not respond. Finally, Harvey grabbed the steering wheel in an attempt to stop the car. At that point, Martinez ordered Harvey not to grab the wheel, and said that he had a gun in the car and did not want to be stopped by the police. Martinez then removed a firearm from the glove compartment and placed it in his lap. The gun remained present for the duration of the encounter.

Martinez's excessive speed caused Harvey to be "afraid [for her] life." Joint Appendix ("JA") 152. He continued his frenetic pace until he reached a desolate area past the Salt River, 10.8 miles from Harbor View. Martinez drove up a steep hill known as "The Beast," turned the car around at a dead end so that it faced down the hill, and turned off the lights. With the gun still in his lap, Martinez then demanded that Harvey have sex with him. She declined, stating, "No, I don't want to have sex with you because you is my cousin." Id. When she did not acquiesce, Martinez ordered Harvey out of the car and sped away.

Five minutes later, Martinez returned, at which time Harvey opened the rear passenger door and reentered the car. It is undisputed that at some point thereafter, Martinez and Harvey engaged in sexual intercourse. The nature of the sexual encounter, however, is vigorously disputed: Martinez claimed that it was consensual, and Harvey alleged that it was not. In any event, whatever happened in fact is not critical to resolution of this appeal.

The record is not entirely clear how long the episode lasted, but it appears to have taken place over a period of about an hour. Two days later, Harvey told her mother, Faye Martinez (who is the defendant's aunt), about the incident, and her mother then took her to the hospital. Harvey gave a statement to police officers at the hospital, after which the officers recovered her undergarments. Analysis on the clothing tested positive for DNA consistent with Martinez's.

Martinez was arrested on July 9, 2003, and was charged in a six-count criminal information with aggravated rape in the first degree (in violation of V.I. Code Ann. tit. 14, § 1700); aggravated rape in the second degree (in violation of V.I. Code Ann. tit. 14, § 1700a); kidnapping for rape (in violation of V.I. Code Ann. tit. 14, § 1052(b)); two counts of unlawful sexual contact in the first degree (in violation of V.I. Code Ann. tit. 14, § 1708); and possession of a deadly weapon during a crime of violence (in violation of V.I. Code Ann. tit. 14, § 2251(a)). Martinez did not dispute that he had sexual intercourse with Harvey, but claimed that the encounter had been entirely consensual. After a three-day trial, the jury convicted him of kidnapping for rape (Count Three), but

acquitted him of the other charges.[1] The trial court sentenced him to thirty years in prison. The Appellate Division affirmed the conviction, and this appeal followed.

II.

We first consider our jurisdiction. The Appellate Division exercised appellate jurisdiction under 48 U.S.C. § 1613a(a), and entered its order affirming the conviction on February 27, 2008. On May 20, 2008, the Appellate Division entered on its docket a handwritten letter from Martinez, dated May 15, 2008, in which he averred that he had only recently learned that his conviction had been affirmed. He explained that his attorney had been disbarred and had not forwarded him a copy of the Appellate Division's opinion and order. The court appointed new counsel, who filed a notice of appeal on June 10, 2008, 104 days after entry of the Appellate Division's final order.

On June 17, 2008, the Clerk of this Court issued an order (1) advising the parties that we may lack appellate jurisdiction, and (2) directing them to file responses addressing the issue. The Government did not file a response (and has never addressed the jurisdictional issue in this Court); Martinez filed a response through counsel. A motions panel thereafter referred the issue to this merits panel to consider whether the time limitation in Federal Rule of Appellate Procedure 4(b) is a jurisdictional

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[1] Before the case was submitted to the jury, the trial court dismissed the charge of aggravated rape in the second degree.

requirement, or a claim-processing rule subject to forfeiture.

"The Federal Rules of Appellate Procedure govern appeals to our [C]ourt from the District Court of the Virgin Islands[, Appellate Division]. Therefore, the time limits for the filing of a notice of appeal in a criminal case are those set out in Fed. R. App. P. 4(b)." Gov't of the V.I. v. Charleswell, 24 F.3d 571, 575 (3d Cir. 1994) (citation and footnote omitted). Rule 4(b) required Martinez to file a notice of appeal within ten days of the entry of the Appellate Division's final order.[2] It is undisputed that he did not do so. Our decisions have repeatedly noted that the failure to file a timely notice of appeal in a criminal case deprives us of appellate jurisdiction. See, e.g., United States v. Carelock, 459 F.3d 437, 440-43 (3d Cir. 2006); United States v. Kress, 944 F.2d 155, 161 (3d Cir. 1991); United States v. Vastola, 899 F.2d 211, 220 (3d Cir.), vacated on other grounds, 497 U.S. 1001 (1990); United States v. Grana, 864 F.2d 312, 314 (3d Cir. 1989).

While a panel of our Court is bound by the precedential decisions of earlier panels, that rule does not apply "when the prior decision[s] conflict[] with a Supreme Court decision." United States v. Tann, 577 F.3d 533, 541 (3d Cir. 2009); see also United States v. Singletary, 268 F.3d 196, 202 (3d Cir. 2001); Third Circuit Internal Operating Procedure 9.1. Three recent Supreme Court decisions compel us to revise our prior jurisdictional view of Rule 4(b): Kontrick v. Ryan, 540

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[2] Rule 4(b) now prescribes a fourteen-day window to file a notice of appeal in a criminal case. Fed. R. App. P. 4(b).

U.S. 443 (2004); Eberhart v. United States, 546 U.S. 12 (2005) (per curiam); and Bowles v. Russell, 551 U.S. 205 (2007). In accordance with the uniform holdings of our sister courts of appeals following these decisions,[3] we now hold that Rule 4(b) is not jurisdictional and is subject to forfeiture.

In Kontrick, the Supreme Court held that Federal Rule of Bankruptcy Procedure 4004 – which sets forth a sixty-day window for a creditor to file a complaint objecting to a debtor's discharge – is not jurisdictional. 540 U.S. at 447. The Court explained that the term "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating "a court's adjudicatory authority." Id. at 455. With respect to the former, the Court emphasized, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." Id. at 452 (citing U.S. Const. art. III, § 1).

Though other bankruptcy-related time constraints appear in the judicial code, the Court noted that the specific statutory "provision conferring jurisdiction over objections to discharge . . . contains no timeliness condition." Id. at 453. Instead, the time limitation

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[3] See, e.g., United States v. Neff, 598 F.3d 320, 323 (7th Cir. 2010); United States v. Urutyan, 564 F.3d 679, 685 (4th Cir. 2009); United States v. Lopez, 562 F.3d 1309, 1313 (11th Cir. 2009); United States v. Byfield, 522 F.3d 400, 403 n.2 (D.C. Cir. 2008); United States v. Frias, 521 F.3d 229, 233 (2d Cir.), cert. denied, 129 S. Ct. 289 (2008); United States v. Garduno, 506 F.3d 1287, 1290-91 (10th Cir. 2007); United States v. Martinez, 496 F.3d 387, 388-89 (5th Cir. 2007) (per curiam); United States v. Sadler, 480 F.3d 932, 934 (9th Cir. 2007).

governing objections to discharge is governed solely by Rule 4004, a court-prescribed rule established for the "practice and procedure" in bankruptcy actions. Id. The Court recognized that it and other courts had been "less than meticulous" in distinguishing between statutory provisions circumscribing a court's authority to hear a case and "emphatic time prescriptions in rules of court." Id. at 454. Clarifying the distinction, the Court explained that while "subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct[,] a claim-processing rule, . . . even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." Id. Because the debtor there had not raised the objector's untimeliness until after the objection had been litigated on the merits, the Court held that the argument had been forfeited and that jurisdiction had been properly exercised.

In Eberhart, the Court, relying on Kontrick, held that Federal Rule of Criminal Procedure 33 – which at the time gave a criminal defendant seven days to file a motion for a new trial – is not jurisdictional. 546 U.S. at 13. Rejecting the notion that court-prescribed rules by themselves provide the "keys to the kingdom of subject-matter jurisdiction," id. at 17, the Court explained that Rule 4004 and Rule 33(a) are "virtually identical provisions." Id. at 16. The Court concluded that the latter, like the former, is a rigid claim-processing rule, but one whose protection is subject to forfeiture if not properly invoked.

Finally, in Bowles, the Supreme Court held that Federal Rule of Appellate Procedure 4(a)(6) – which governs a district court's authority to extend the time

to appeal in civil cases – is jurisdictional. 551 U.S. at 213. Though the Court stated generally that "time limits for filing a notice of appeal are jurisdictional in nature," id. at 206, it repeatedly grounded its holding on "the jurisdictional significance of the fact that a time limitation is set forth in a statute." Id. at 210 (emphasis added); see also id. (stating that Kontrick, Eberhart, and other cases had not "call[ed] into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional." (emphasis added)); id. at 211-12 (noting the "jurisdictional distinction between court-promulgated rules and limits enacted by Congress"); Lizardo v. United States, __ F.3d __, __, No. 08-2044, 2010 U.S. App. LEXIS 16489, at *9 (3d Cir. Aug. 10, 2010) ("The Bowles Court explained that time limits that are not based on a statute . . . are not jurisdictional rules, but claim-processing rules.").

Because 28 U.S.C. § 2107 prescribes time limits for filing a civil appeal – and because the constraints imposed by Rule 4(a)(6) are also required by the statute – the Bowles Court concluded that the time to file a notice of appeal in a civil case and the statutory provisions governing extensions of that time limit are jurisdictional. Notably, the Court bolstered its holding by contrasting Rule 4(a) with its criminal counterpart: "we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because the procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional . . . ." 551 U.S. at 212 (quotation marks omitted); see also Lizardo, __F.3d at __, 2010 U.S. App. LEXIS 16489, at *10 (noting the Bowles Court's distinction between the rules governing civil and criminal appeals).

Until 1948, the deadline to file a notice of appeal in both civil and criminal cases was prescribed by 28 U.S.C. § 2107. See United States v. Frias, 521 F.3d 229, 233 (2d Cir.), cert. denied, 129 S. Ct. 289 (2008). Since then, however, § 2107 – together with Rule 4(a) – has governed only the deadline to appeal in civil cases. Rule 4(b), by contrast, has governed the time to file a notice of appeal in criminal cases since 1968 – absent statutory mandate.[4] Because Rule 4(b) is not grounded in statute, therefore, we are not deprived of appellate jurisdiction if a party fails to invoke the rule properly upon an untimely notice of appeal.[5]

We repeat that Rule 4(b)'s deadline is rigid. Upon proper invocation of the rule when a notice of appeal is filed out of time, we must dismiss the appeal. In this case, however, the Government has never invoked

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[4] Federal Rule of Criminal Procedure 33 governed the time to file a notice of appeal in criminal cases from 1948 to 1968.

[5] In United States v. Carelock – decided before Bowles but after Kontrick and Eberhart – we held that an appellant's failure to file a notice of appeal compliant with Rule 3(c) (governing the contents of a notice of appeal) deprived us of jurisdiction. 459 F.3d at 441-43. By the time a proper notice of appeal had been filed, Rule 4(b)'s deadline had run. Id. at 443. In a footnote, we identified the issue that Kontrick and Eberhart raised with respect to Rule 4(b). Id. at 440 n.6. We noted in dicta that "the language and commentary of the rules, along with their prior treatment by the Supreme Court and this Court, strongly support the conclusion that Rules 3 and 4 govern subject-matter jurisdiction." Id. But because the Government had raised a proper objection to the non-compliant notice of appeal, we did not answer the question at that time. Id. In light of Bowles and the holdings of our sister circuits, we believe it is clear that Rule 4(b) can no longer be considered a jurisdictional limitation. Because it is not before us, we need not consider the jurisdictional implications of Rule 3(c).

Rule 4(b). It did not respond to the Clerk's order directing it to advise us on its position, and it did not mention the issue in its merits brief. Because the Government has clearly forfeited the untimeliness argument available to it, we exercise jurisdiction.[6] We do so pursuant to 48 U.S.C. § 1613a(c).

III.

Martinez argues that the evidence is insufficient to sustain the kidnapping for rape conviction under V.I. Code Ann. tit. 14, § 1052(b). We exercise plenary review over Martinez's sufficiency challenge, United States v. Bornman, 559 F.3d 150, 152 (3d Cir. 2009), yet that review is narrow. United States v. Rawlins, 606 F.3d 73, 80 (3d Cir. 2010). We will accept the jury's verdict if, viewing the evidence in the light most favorable to the Government, "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Voigt, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in Jackson). "[W]e examine the totality of

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[6] It remains an open question whether this Court may invoke Rule 4(b)'s time limit sua sponte and dismiss an untimely criminal appeal absent a motion by a party. See Frias, 521 F.3d at 234 n.5 (declining to answer the question). At least one other court of appeals has answered that question affirmatively, retaining discretion to invoke the rule "when judicial resources and administration are . . . implicated and the delay has . . . been inordinate." United States v. Mitchell, 518 F.3d 740, 750 (10th Cir. 2008); see also id. at 752-55 (Lucero, J., dissenting) (agreeing that courts of appeals have discretion to dismiss an untimely appeal when an appellee fails to invoke Rule 4(b), but disagreeing that such discretion should be so narrowly circumscribed). We leave this question for another day.

the evidence, both direct and circumstantial, and must credit all available inferences in favor of the [G]overnment." United States v. Sparrow, 371 F.3d 851, 852 (3d Cir. 2004) (quotation marks omitted).

Section 1052(b) of the Virgin Islands Code provides in its entirety:

> Whoever abducts, takes or carries away any person by force or threat with the intent to commit rape is guilty of kidnapping and shall be imprisoned for not less than 15 years and shall not be eligible for parole until he has served at least one-half of [the] sentence imposed.

V.I. Code Ann. tit. 14, § 1052(b). Section 1052(b) required the Government to prove beyond a reasonable doubt: (1) that Martinez abducted, took, or carried away Harvey against her will; (2) that he did so by force or threat; and (3) that he intended to commit rape while doing so.[7] With respect to the kidnapping

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[7] The Virgin Islands Code specifies several classes of rape. Aside from the independent offenses of unlawful sexual contact in the first and second degrees, see V.I. Code Ann. tit. 14, §§ 170809, the Code delineates the crimes of rape in the first, second, and third degrees, and aggravated rape in the first and second degrees. See V.I. Code Ann. tit. 14, §§ 1700-03. But § 1052(b) does not specify which version of rape a defendant must intend to commit during a kidnapping to violate the statute. We can readily discern the answer. The statute does not require a defendant to intend to commit aggravated rape, for it plainly says only "intent to commit rape." Conversely, the crimes of rape in the second and third degrees are statutory-rape prohibitions, in which the crime is defined based on the respective ages of the perpetrator and the victim, not on the perpetrator's intent or the victim's consent. See Gov't of the V.I. v. Richards, 44 V.I. 47, 55 (Terr. Ct. 2001).

component of the crime, we must consider (1) the duration and distance of asportation of the victim, and (2) whether the asportation created a significant danger to the victim independent of that posed by a separate ongoing offense. Gov't of the V.I. v. Ventura, 775 F.2d 92, 96-98 (3d Cir. 1985) (modifying four-factor test set forth in Gov't of the V.I. v. Berry, 604 F.2d 221, 227 (3d Cir. 1979)).[8]

Accordingly, we believe it is it clear that § 1052(b) requires the Government to prove that the defendant intended to commit (at least) rape in the first degree. Relevant here, such a crime occurs when a defendant engages in sexual intercourse or sodomy with another "when the [victim's] resistance is forciblyovercome." V.I. Code Ann. tit. 14, § 1701(2).

[8] In Berry, we interpreted § 1052 (then a general kidnapping statute) narrowly to preclude its "overzealous enforcement . . . [against] persons who have committed such substantive crimes as robbery or assault[, and] which inherently involve the temporary detention or seizure of the victim . . . ." 604 F.2d at 226. Lest those defendants be punished for kidnapping when "in reality [they] committed lesser or different offenses, of which temporary seizure or detention played an incidental part," id., we set forth four factors to determine whether a defendant was guilty of the separate crime of kidnapping: (1) the duration and distance of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense. Id. at 227. After we decided Berry, the Virgin Islands legislature added § 1052(b), ultimately prompting our decision in Ventura. There, we explained that by enacting the kidnapping-for-rape statute, "the legislature was not concerned, as was the Berry court, about the risk of over-zealous application of the kidnapping charge to impose a sentence substantially greater than that attached to the underlying crime." 775 F.3d at 96. We held that while the statutory amendment

Martinez first argues that because Harvey entered the car voluntarily at the Harbor View parking lot, the evidence was insufficient to prove that he took her away against her will. We disagree. No language exists in § 1052(b) that would absolve the abduction of an unconsenting victim merely because the victim's initial interaction with the perpetrator was voluntary. We hold – as have the majority of courts considering similar proposed interpretations of the federal kidnapping statutes – that § 1052(b) reaches the abduction of an individual during an otherwise consensual encounter if consent is withdrawn at some point after the encounter commences.[9] Harvey's

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marginalized the second and third Berry factors, the first and fourth factors remained applicable to § 1052(b). Id. at 97-98. We emphasized, however, that "the modified Berry test used in § 1052(b) cases is not a stringent one." Id. at 98 n.12. Here, Martinez argues that Berry compels reversal of his conviction. He ignores Ventura entirely. In this opinion, we refer to the "first" and "second" Ventura factors, which are synonymous with the first and fourth Berry factors.

[9] See, e.g., United States v. Tian, 339 F.3d 143, 152 (2d Cir. 2003) ("The Hostage Taking Act . . . does not require that a seizure or detention be against a hostage's will from its inception."); United States v. Carrion-Caliz, 944 F.2d 220, 226 (5th Cir. 1991) ("The dispositive question is not whether [the hostages] initially agreed to go to [the hostage taker's] house, but rather whether [the hostages] later were detained or confined there against their will."); United States v. Eagle Thunder, 893 F.2d 950, 952 (8th Cir. 1990) ("Even if [the victim] had initially consented to accompanying [the defendant in his car], that fact would not prevent the occurrence of a kidnapping because [the defendant] thereafter detained [the victim] despite her repeated requests to be taken home or to her mother."); United States v. Redmond, 803 F.2d 438, 439 (9th Cir. 1986) ("The fact that one originally accompanies another without being forced does not prevent the

testimony that she several times pleaded with Martinez to take her home easily supported the jury's finding that she had been detained against her will during the car ride.

Martinez next argues that the evidence was insufficient to sustain the element that force or threat be used to carry out the kidnapping. We disagree. Harvey's testimony that Martinez brandished the gun in the car (where it remained on his lap for the duration of the ride) was sufficient to permit the jury to find that Martinez detained Harvey by force or threat. Introduction of the gun into the equation stopped Harvey's attempt to grab the steering wheel instantly. Alternatively, immediately before Martinez actually brandished the gun, he ordered Harvey not to grab the steering wheel because he had a gun and did not want to be stopped by the police. This threat alone established the element of force or threat, whether the gun itself was ever introduced or not. See United States v. Macklin, 671 F.2d 60, 64 (2d Cir. 1982) (noting that a kidnapping offense requires a defendant to use "some means of force – actual or threatened, physical or mental – . . . so that the victim is taken, held and transported against his or her will" (emphasis added)).

Martinez next argues that any asportation in this case was "minimal." We disagree. The evidence readily

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occurrence of a kidnapping where force is later used to seize or confine the victim."); United States v. McBryar, 553 F.2d 433, 434 (5th Cir. 1977) (per curiam) (kidnapping conviction upheld where defendant agreed to take victim to one destination but drove in opposite direction and refused her requests to be let out of automobile).

established the first Ventura factor (distance or duration of the asportation). Martinez transported Harvey 10.8 miles from Harbor View to the secluded area where the sexual encounter occurred, and the entire episode appears to have lasted about an hour. This is plainly sufficient. See Gov't of the V.I. v. Alment, 820 F.2d 635, 638 (3d Cir. 1987) (concluding that evidence of asportation from "one environment . . . to another" over a distance of approximately seventy feet was sufficient); Ventura, 775 F.2d at 98 (explaining that dragging victim indoors, over a period of several minutes and for a distance of eighty-eight feet was sufficient degree of asportation under the less-stringent modified Berry framework).

Martinez also claims that "no evidence regarding [independent] significant danger was ever presented at trial." Martinez Br. at 19. We disagree. The second Ventura factor was satisfied by testimony regarding: (1) Martinez's reckless driving en route to the Salt River area; (2) the presence of the firearm throughout the episode; and (3) the fact that the alleged kidnapping occurred several minutes before the sexual encounter itself. See Ventura, 775 F.2d at 98 (explaining that harm of being dragged "through the bushes by the ear while [the defendant was] carrying a gun" is significant danger, and independent of the rape committed). The threat posed by the firearm and Martinez's driving clearly presented a danger independent of any harm posed by the alleged sexual assault.

Finally, Martinez argues that the evidence was insufficient to establish that he formed the specific intent to commit rape during the asportation because the acquittal on the rape charge removes any possible

inference that he had formed the intent to commit rape at an antecedent moment. We disagree. As an initial matter, even accepting for the moment that the jury acquitted Martinez of rape because it determined that the sexual intercourse was consensual, we reject the underlying premise of the claim. There is no logical or temporal inconsistency between a finding that Martinez intended to rape Harvey at one point in time, and a finding that Harvey nevertheless acquiesced to Martinez's sexual advances several minutes later.

In any event, Martinez appears to argue that, having found the sexual act voluntary as to the rape charge, the jury was not permitted to use Harvey's testimony about that act in determining his earlier intent as to the kidnapping charge. Again we disagree. Each count of the criminal information was independent of the next; the jury was permitted – indeed, required – to assess all of the evidence as it pertained to each individual count. Hypothesizing about contradictory jury verdicts does not afford a basis for reversing a conviction on sufficiency-of-the-evidence review. See United States v. Powell, 469 U.S. 57, 62 (1984) (reaffirming that "[c]onsistency in the verdict is not necessary" (quoting Dunn v. United States, 284 U.S. 390, 393 (1932))); United States v. Mussare, 405 F.3d 161, 167 (3d Cir. 2005) ("[T]here is no requirement that a jury's verdict be consistent.").

If, as Martinez presumes, the jury determined that the sexual act was consensual as it considered the rape charge, it was not beholden to that conclusion when it considered the kidnapping charge. We, in turn, may not reverse purely because the jury's resolution of the historical facts might seem inconsistent:

> [A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilty beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.

Powell, 469 U.S. at 67 (emphasis added, citations omitted); see also United States v. Alicea, 205 F.3d 480, 484 (1st Cir. 2000) ("In a single, multi-count trial, acquittal on one or more counts does not preclude conviction on other counts based upon the same evidence, as long as that evidence is legally sufficient to support a finding of guilt on the count(s) of conviction." (emphasis added)); United States v. Church, 955 F.2d 688, 695 (11th Cir. 1992).

Thus, while the jury found that the Government had not proved the crimes of aggravated rape and unlawful sexual contact beyond a reasonable doubt, it was free to use Harvey's testimony that Martinez raped her when considering whether he had formed

the specific intent to rape at an earlier point in time. See United States v. Sriyuth, 98 F.3d 739, 747 (3d Cir. 1996) (holding evidence of sexual assault relevant to show defendant's motive in kidnapping victim); United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982) ("This Court has previously held evidence of sexual relations admissible because of its relevance to motive in a kidnapping case."). In sum, the jury's acquittal on the other counts "is irrelevant to our singular focus on and determination of whether the evidence adduced at trial supports" the conviction on Count Three. United States v. Veal, 153 F.3d 1233, 1253 (11th Cir. 1998).[10]

Viewing all of the evidence in the light most favorable to the Government, we conclude that it was sufficient to support a finding that Martinez possessed an intent to rape Harvey during the car ride. Within a span of several minutes, Martinez took Harvey against her will to a secluded area, brandished a firearm and threatened her in doing so, immediately demanded that she have sex with him (a demand she refused), whereupon he ordered her out of the car before driving away. Additionally, Dawn Callwood, Martinez's unrelated "aunt," testified that some time after the incident, Martinez called her and admitted that "something just happened . . . [s]omething just came over him. . . . [S]omething just popped . . . just went pop in his head." JA 116. Callwood also testified that Martinez attempted to "justify himself" to her, id., and that he admitted that "something happened to

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[10] Similarly, although it acquitted Martinez of unlawful possession of a deadly weapon during a crime of violence, the jury was entitled to accept Harvey's testimony that Martinez used a gun to carry out the kidnapping.

Chenae." JA 117. Corroborating this account was Faye Martinez's testimony that the defendant called her after the incident and, "sound[ing] very afraid," said that he knew Harvey's father and uncle were looking for him, but that it was "not going to go down like that." JA 217.

Drawing all reasonable inferences in the Government's favor, the evidence surrounding the sexual encounter, along with Martinez's own statements and the evidence of his aggressive, threatening, overbearing, and violent conduct, was sufficient to sustain the jury's determination of Martinez's specific intent at the time of the kidnapping. See Ratzlaf v. United States, 510 U.S. 135, 149 n.19 (1994) ("A jury may, of course, find the requisite knowledge on [the] defendant's part by drawing reasonable inferences from the evidence of [the] defendant's conduct . . . .").

* * * *

For these reasons, we conclude that the evidence was sufficient to support the kidnapping for rape conviction.

IV.

Martinez claims that the Government violated his right to due process by questioning him on his post-arrest silence, in violation of the rule announced in Doyle v. Ohio, 426 U.S. 610 (1976). The facts underlying this claim are as follows. Martinez testified in his own defense that earlier in the day on June 16, 2003, Harvey asked him for $500 or $600 and said that if he gave her the money she "would make it worth

[his] while." JA 338-39. Martinez testified that he understood this to mean that Harvey "wanted to have sex." JA 339. He then testified: (1) that the sexual episode later that evening was consensual; (2) that Harvey thereafter demanded the money she had requested; (3) that she threatened to tell everyone that he had raped her if he did not provide the money; and (4) that when he did not give her the money, she accused him of rape.

The Government sought to dispel Martinez's exculpatory account on cross-examination. The prosecutor first asked: "Did you make a statement to Officer Berrios about what you told us here today?" JA 350. The trial court sustained defense counsel's objection, and before Martinez could answer, it interjected, "You don't have to answer." Id. After the prosecutor pressed Martinez as to whether Harvey had ever before requested money from him (Martinez admitted that she had not), this disjointed exchange ensued:

> Q. Did you ask Chenae if she had some type of problem that she would need this 5 or $600?
>
> A. No, sir.
>
> Q. Did you tell [Faye] Martinez that Chenae might be in some trouble and needed 5 or $600?
>
> A. No, sir.
>
> Q. Did you tell your mother that Chenae demanded 5 or $600 from you?
>
> [Defense Counsel]: Objection, Your Honor.

The Court: Overruled.

Q. Did you tell your mother that Chenae was trying to shake you down for 5 or $600?

[Defense Counsel]: Objection as to shake down.

The Court: Sustained.

Q. Did you tell your mother that Chenae demanded 5 or $600 from you and said she would make it worth your while?

A. No, sir.

Q. Did you tell anyone other than today that Chenae demanded 5 or $600 from you?

[Defense Counsel]: Objection, your Honor.

The Court: Overruled.

Q. Other than your attorney –

[Defense Counsel]: Objection, your Honor.

The Court: Sustained as to the attorney.

Q. Did you tell anyone –

[Defense Counsel]: Objection. May we approach, Your Honor?

The Court: You may.

JA 351-53.

At sidebar, defense counsel objected to the question whether Martinez had told "anyone" his story, but the trial court was unconvinced:

> [Defense Counsel]: Your Honor, the defendant has a right not to say anything to anyone, your Honor; has a right to remain silent. He has a right to privilege against self-incrimination. He has a right not to say anything.
>
> The Court: He has a right not to say anything to law enforcement officers, but – as I see it, the object of the government's [questions] is to indicate that the defendant recently made up the story.
>
> [Defense Counsel]: Well, that may very well be so if that's their object. If they can get it in, they can't get it in through this kind of questioning. He has a right not to say anything to anyone.
>
> The Court: I understand he has a right not to say anything to anyone, but they can ask him if he said it.

JA 353. After the sidebar, this colloquy followed:

> Q. Sir, did you tell anyone that Chenae demanded 5, $600 from you?
>
> A. Excuse me, sir?
>
> Q. Did you tell anyone that Chenae demanded 5 to $600 from you?
>
> A. My attorney.
>
> [Defense Counsel]: I continue my objections.
>
> The Court: Yes.

JA 354. The Government then moved to another line of questioning.

During his summation, the prosecutor challenged Martinez's story that Harvey had falsely implicated him of rape. The prosecutor emphasized Martinez's admissions that he had never before flirted with Harvey and that Harvey had never before requested money from him. Accordingly, the prosecutor argued, it would be nonsensical to believe that Harvey sought from her cousin money in exchange for sex out of the blue. The prosecutor never referred, however, to the fact that Martinez had proffered his exculpatory account for the first time at trial, nor did he mention Martinez's post-arrest silence more generally.

"[P]articularly concerned" with the breadth of the prosecutor's questions whether Martinez had ever told "anyone" his exculpatory account, the Appellate Division held that the Government had violated Doyle.

JA 578. But the court concluded that the constitutional error was harmless because "overwhelming" evidence existed such that "the jury could have determined that Martinez [took] Harvey away by threat or force with the intent to rape her." JA 581.

Our review of this constitutional question is plenary. Gov't of the V.I. v. Davis, 561 F.3d 159, 163 (3d Cir. 2009). As we explain below, violations of Doyle are subject to harmless error analysis. Accordingly, we ask first whether a violation occurred and, if it did, we ask whether it had an effect on the jury's verdict beyond a reasonable doubt. See id. We share the Appellate Division's concern with some of the prosecutor's questions. We also agree, albeit for different reasons, that any Doyle violation was harmless beyond a reasonable doubt.

A.

Once a criminal defendant receives the prophylactic warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), it is improper under Doyle "for a prosecutor to cause the jury to draw an impermissible inference of guilt from a defendant's post-arrest silence." Hassine v. Zimmerman, 160 F.3d 941, 947 (3d Cir. 1998). This is so because Miranda warnings carry the Government's "implicit assurance" that an arrestee's invocation of the Fifth Amendment right to remain silent will not later be used against him. Davis, 561 F.3d at 163-64 (quoting Wainwright v. Greenfield, 474 U.S. 284, 290-91 (1986)); United States v. Johnson, 302 F.3d 139, 146 (3d Cir. 2002). Because a defendant's post-Miranda warning silence could be nothing more than an invocation of his right to silence, it would be fundamentally unfair to permit a breach of that

assurance by allowing impeaching questions as to why he failed to give an exculpatory account to the police after receiving the warnings. See Davis, 561 F.3d at 163.[11]

Not every reference to a defendant's silence, however, results in a Doyle violation. Where "no governmental action induce[s] the defendant to remain silent," Fletcher v. Weir, 455 U.S. 603, 606 (1982), the Miranda-based fairness rationale does not control. Consequently, the Government permissibly may impeach a defendant's testimony using his pre-arrest silence, Jenkins v. Anderson, 447 U.S. 231, 240 (1980); his post-arrest, pre-Miranda warning silence, Fletcher, 455 U.S. at 605-07[12]; and any voluntary post-Miranda warning statements, Anderson v. Charles, 447 U.S.

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[11] The Government argues that Doyle is limited only to a defendant's silence immediately after receiving Miranda warnings, not to his general silence in the lead-up to trial. The Government argues that this case is controlled instead by Raffel v. United States, 271 U.S. 494, 496 (1926) (holding that Fifth Amendment "immunity from giving testimony is one which the defendant may waive by offering himself as a witness"), and that inquiry into Martinez's general pretrial silence was therefore proper. We rejected an identical argument in Davis, and therefore we need not address the claim at length here. See 561 F.3d at 164-65; accord Hassine, 160 F.3d at 947-49; United States v. Balter, 91 F.3d 427, 439 (3d Cir. 1996).

[12] The Government argues that Martinez failed to lay an evidentiary foundation that he received Miranda warnings, and accordingly that no Doyle violation occurred under Fletcher. It is the Government, however, that bears the burden of establishing that no Miranda warnings were given if post-arrest silence is to be used. United States v. Cummiskey, 728 F.2d 200, 206 (3d Cir. 1984). Because it does not ultimately affect our disposition, we will assume arguendo that Martinez received the warnings.

404, 408-09 (1980). Additionally, under Greer v. Miller, 483 U.S. 756 (1987), "there may be no Doyle violation where the trial court sustains an objection to the improper question and provides a curative instruction to the jury, thereby barring the prosecutor from using the silence for impeachment." Davis, 561 F.3d at 164 (citing Greer, 483 U.S. at 764-65).

Having scrupulously reviewed the trial transcript, we share the Appellate Division's concern with some of the Government's questions. Referring to Martinez's exculpatory account, the prosecutor first asked: "Did you make a statement to Officer Berrios about what you told us here today?" JA 350. The prosecutor clearly sought by this question to undermine Martinez's story by highlighting his failure to tell the officer that same version at an earlier point in time. We cannot say with certainty, however, that the question was improper, because a crucial ambiguity exists in the record regarding Officer Berrios. Harvey's testimony on cross-examination reveals circumstantially that the officer took her statement at the hospital two days after the incident. JA 181-85, 189. But Officer Berrios did not testify at trial, and the record does not disclose what role he played in Martinez's arrest, or whether Martinez's failure to give the exculpatory story to him occurred before or after the arrest, or before or after Miranda warnings had been given.

Accordingly, we cannot discern whether the prosecutor's question was permissible under Jenkins, Fletcher, or Anderson on the one hand, or whether it

violated Doyle on the other.[13] The context of the question and the lack of relevant evidence underlying it give us pause, and our analysis below is mindful of these uncertainties. Unable to answer definitively whether the question violated Doyle, we turn to the questions that Martinez centrally challenges on appeal – those in which the prosecutor asked whether Martinez had ever told "anyone" his exculpatory account.[14]

We also share the Appellate Division's concern that these questions "were overly broad and [their] breadth and obscurity affect the applicable review . . . ." JA 578. Because the prosecutor placed no personal or temporal specifications on the questions, they might well have been construed as targeting Martinez's post-arrest, post-Miranda warning failure to proffer his story to the police. See United States v. Dodd, 111 F.3d 867, 869 (11th Cir. 1997) (per curiam) ("A comment is deemed to be a reference to a defendant's

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[13] If the question was improper, the Supreme Court's decision in Greer does not cure it. While defense counsel immediately and successfully interposed an objection to the question (thus precluding Martinez's silence from actually being submitted to the jury, see Johnson, 302 F.3d at 147), the trial court failed to provide a curative instruction to the jury that it was not to consider Martinez's post-arrest silence against him. We have emphasized on several occasions the importance of such an instruction in order for Greer to apply. See Davis, 561 F.3d at 164; Johnson, 302 F.3d at 148 n.10; Hassine, 160 F.3d at 948. Additionally, the prosecutor went on to ask other potentially problematic questions.

[14] Martinez does not take issue with the questions regarding whether he told his story to Faye Martinez or his mother, and we therefore do not address them.

silence if . . . it was of such a character that the jury would naturally and necessarily understand it to be a comment on a defendant's silence." (quotation marks omitted)).

The Appellate Division was hesitant to construe such openended and ambiguous questions against Martinez. So are we. Under the circumstances, we think that the prosecutor's questioning in this case approached the constitutional line, and likely crossed it. However, we need not decide definitively whether the Government's questions violated Doyle, because we will affirm the District Court's judgment even assuming that they did. See United States v. Rodriguez, 43 F.3d 117, 122 (5th Cir. 1995) (assuming for the sake of argument that a Doyle violation occurred where the "prosecutor's questions were sufficiently broad as to be construed as commentary on [the defendant's] failure to come forward with his alibi (1) prior to arrest, (2) immediately after arrest and Miranda warnings . . . , and (3) during the time period prior to trial but following his arrest"); cf. United States v. Balter, 91 F.3d 427, 440 (3d Cir. 1996) (assuming arguendo that the prosecutor's questions violated Doyle and proceeding to harmless-error analysis).

B.

We hold that any Doyle violation here was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967) (holding that a constitutional error is harmless where it can be "prove[d] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"); Balter, 91 F.3d at 440 ("The Supreme Court

has held 'that Doyle error fits squarely into the category of constitutional violations which [it] has characterized as trial error.'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)) (alteration in Balter)).

Before explaining why, we pause to note that the Appellate Division's analysis suffers from the same deficiencies that we recently identified in Davis. The court held in this case that any Doyle error was harmless because "the evidence of Martinez'[s] guilt . . . was overwhelming" and accordingly that "even without the prosecutor's inappropriate question, the jury could have determined that Martinez [committed kidnapping for rape]." JA 581. By comparison, in Davis, the Appellate Division held that the Doyle error was harmless because there existed "significant evidence from which the jury could have found guilt." 561 F.3d at 165 (quotation marks omitted). Rejecting that formulation, we reminded the court that the relevant question under Chapman "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (quoting United States v. Korey, 472 F.3d 89, 96 (3d Cir. 2007)). Our ensuing explanation applies equally here:

> [W]e are unsatisfied with this conclusion insofar as the Appellate Division focused on whether the evidence was sufficient to convict despite the error, as opposed to whether there was a reasonable possibility that the error contributed to the jury verdict. See Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988) ("The question, however, is not whether the legally admitted

> evidence was sufficient . . . but rather, whether the [Government] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (quoting Chapman, 386 U.S. at 24)).

Id. at 166. We are compelled to reiterate that constitutional harmless-error analysis is not merely a review of whether the jury "could have" returned a verdict absent the constitutional error. Such an analysis improperly conflates sufficiency-of-the-evidence review with the appropriate Chapman standard.

We are similarly unconvinced – as we were in Davis, see id. – that the evidence proffered against Martinez can be characterized as "overwhelming." Martinez did not dispute at trial that he took Harvey to the Salt River in his car, nor did he deny that he had sexual intercourse with her. Consequently, the central issue in the case concerned whether the episode was consensual, and thus it turned on the credibility of Harvey, Dawn Callwood, Faye Martinez, and the defendant. Although Callwood and Faye Martinez both testified that the defendant called them after the incident and implicated himself (thus corroborating Harvey's account and strengthening the Government's case), these witnesses were subject to rigorous cross-examination concerning their possible biases. See id. (highlighting the "close associations" between the three eyewitnesses whose testimony purportedly provided "overwhelming evidence" against the defendant). At bottom, a critical issue in the case largely required the jury to choose sides in a classic he-said, she-said contest. While we agree that the evidence was solid, we cannot agree with the Appellate

Division that overwhelming evidence against Martinez alone rendered any error harmless.

The foregoing does not inexorably lead us to doubt that the prosecutor's questions played no part in the verdict here. While many of our Doyle cases focus on the quantum of evidence against the defendants, see, e.g., Balter, 91 F.3d at 440, harmless-error analysis must, by necessity, take into account the totality of the circumstances. We have never held, nor do we now, that the amount of incriminating evidence is the only factor implicated in a Doyle harmless-error analysis. Cf. Rodriguez, 43 F.3d at 123 (analyzing whether Doyle error was harmless in light of "the entire record"); United States v. Thomann, 609 F.2d 560, 566 (1st Cir. 1979) ("In the light of all the circumstances in this case . . . , we find that . . . [the error] was harmless and not grounds for reversal."). Under all of the circumstances presented by this case, two related factors ultimately convince us beyond doubt that any error did not affect the jury's verdict.

First is the garbled nature of the challenged colloquy between court, counsel, and witness. Compare United States v. Agee, 597 F.2d 350, 359 (3d Cir. 1979) (en banc) (finding any Doyle error harmless where the challenged question was ambiguous, and explaining that it was unlikely the jury "understood and recollected" the question as anything more than an innocuous reference), with Davis, 561 F.3d at 167 (finding Doyle error not harmless where the prosecutor's questions directly and clearly undermined the plausibility of the defense), and United States v. Curtis, 644 F.2d 263, 270-71 (3d Cir. 1981) (finding Doyle violation not harmless where the improper questions were "neither isolated nor ambiguous").

The challenged questions before the sidebar – which we have already described as overly broad and ambiguous – were either interrupted or immediately followed by objections from defense counsel (some the trial court sustained, some it overruled), preventing the jury from learning or inferring the answers to the questions and thus compounding the ambiguity surrounding them. The questions posed and the answers given after the sidebar were no clearer. Martinez himself needed the prosecutor to repeat his question, and he then referenced his attorney, provoking yet another immediate objection (on an altogether different basis), before the prosecutor promptly moved to another subject. The prosecutor's open-ended questions and attempted questions, the barrage of intermittent objections and interruptions, the varying responses by the trial court, and the partial answers by the defendant all combine to obfuscate further what was already an unclear allusion to Martinez's post-Miranda warning silence. Having studied the transcript, we believe it is exceedingly unlikely that the jury was able to arrive at a negative inference based on the oblique and muddled manner in which Martinez's silence was put before them.

Second, while the challenged questions cannot be said to be "isolated" (as the prosecutor asked a number of times whether Martinez had told his story to "anyone"), see Curtis, 644 F.2d at 270-71; Agee, 597 F.2d at 359, the questions were plainly not a focal point of the cross-examination. In context, the questions were far from flagrant violations of Doyle, but instead came and went in relative passing. See Davis, 561 F.3d at 166 (looking to "the severity of the Doyle violation" when conducting the harmless-error

analysis); United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995) (finding Doyle error harmless where references to post-arrest silence "were limited in their intensity and frequency").

The challenged questions here covered only a small fraction of the furious cross-examination covering multiple subjects and spanning twenty pages of the trial transcript, and were hardly the type of frontal assaults on post-arrest, post-Miranda warning silence that our Court and other courts have held not to be harmless. Additionally, the prosecutor not once referred to Martinez's post-arrest silence or the prior questions about it during summation. Instead, he attacked the veracity of the defendant's account only on the basis that it lacked consistency with his and Harvey's relationship and their conduct before the incident. This fact, in our view, is critical. Compare Scott, 47 F.3d at 907 (finding single improper reference during summation to be harmless), and Agee, 597 F.2d at 359 (noting that counsel did not refer during summation to an arguably improper reference to post-arrest silence), with Davis, 561 F.3d at 162, 167 (finding no harmless error where prosecutor repeatedly emphasized the defendant's post-arrest silence during summation), and United States v. Cummiskey, 728 F.2d 200, 204 (3d Cir. 1984) (finding Doyle error not harmless, in part because "[t]he prosecutor emphasized Cummiskey's silence . . . both during the trial and extensively during closing argument." (emphasis added)).[15]

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[15] We recognize, of course, that in this case the trial court did not give an immediate curative instruction, for it did not recognize the potential problem that the questions posed. See Davis, 561 F.3d

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___The challenged colloquy here was ambiguous and disjointed, and was riddled with interruptions and half-answers. The prosecutor did not highlight Martinez's silence, and after a passing moment he moved on, never referencing the point again. Under all of the circumstances here, we conclude that any error played no role in the jury's verdict. It was therefore harmless.

V.

Martinez asserts two final claims on appeal: (1) that the trial court committed reversible error by admitting implicit and prejudicial hearsay during Harvey's testimony; and (2) that the trial court's jury instructions with respect to the kidnapping charge were impermissibly incomplete. A thorough review of the record convinces us that these claims are entirely without merit, and we reject them without further discussion.

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at 167 (explaining that "the absence of a curative instruction by the Territorial Court likely left the jury with the false impression that the prosecutor's references to Davis's silence . . . were appropriate"). We reiterate the manifest importance of immediate curative instructions whenever a defendant's post-Miranda warning silence is mentioned before the jury. We also emphasize that many Doyle violations will not be harmless precisely because the court did not provide an instruction. It is not the case, however, that a court's failure to give a curative instruction precludes in all cases satisfaction of the Chapman harmless-error standard. It is the vague and ultimately inconsequential nature of the violation that compels the result in this case.

VI.

For the foregoing reasons, we will affirm the order of the Appellate Division.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2694

[September 8, 2010]

GOVERNMENT OF THE VIRGIN ISLANDS)
)
v.)
)
KWANZA MARTINEZ,)
)
Appellant)

On Appeal from the District Court
of the Virgin Islands, Appellate Division
(Crim. No. 1:04-cr-00148-1)
Judges: Hon. Curtis V. Gomez, Hon. Raymond L. Finch, and Hon. Audrey L. Thomas

Submitted Under Third Circuit LAR 34.1(a)
May 4, 2010

Before: SMITH, CHAGARES, and JORDAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Appellate

Division, and was submitted pursuant to Third Circuit LAR 34.1(a) on May 4, 2010.

On consideration whereof, it is now hereby

ADJUDGED and ORDERED by this Court that the judgment of the District Court of the Virgin Islands, Appellate Division dated February 27, 2008, is hereby AFFIRMED. All in accordance with the opinion of this Court.

Attest:

/s/ Marcia M. Waldron,
Clerk

Dated: September 8, 2010

APPENDIX B

*** NOT FOR PUBLICATION ***

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX APPELLATE DIVISION

D.C. CRIM. APP. NO. 2004/148

[Filed February 27, 2008]

KWANZAA MARTINEZ,	)
	)
Appellant,	)
	)
v.	)
	)
GOVERNMENT OF THE VIRGIN ISLANDS,	)
	)
Appellee.	)
	)

Re: Sup.Ct.Crim. 228/2003

On Appeal from the Superior Court of the Virgin Islands

Considered: June 15, 2007
Filed: February 26, 2008

BEFORE: **CURTIS V. GÓMEZ**, Chief Judge, District Court of the Virgin Islands; **RAYMOND L.**

FINCH, Judge of the District Court of the Virgin Islands; and **AUDREY L. THOMAS**, Judge of the Superior Court of the Virgin Islands, sitting by Designation.

ATTORNEYS:

Stephen Brusch, Esq.
St. Croix, U.S.V.I.
Attorney for Appellant.

Maureen Phelan, AAG
St. Thorns, U.S.V.I.
Attorney for Appellee.

MEMORANDUM OPINION

Per Curiam.

I. Issues Presented

(1) Whether the evidence at trial was sufficient to sustain Appellant's conviction of Kidnapping for Rape.

(2) Whether the trial court committed reversible error in its reading of the jury instructions.

(3) Whether the prosecutor violated Appellant's Fifth Amendment right to Due Process by questioning Appellant regarding his post-arrest silence.

(4) Whether the trial court erroneously admitted hearsay testimony.

II. Facts and Procedural Posture

On June 16, 2003, 16 year-old Chenae Harvey ("Harvey") was at home in Harbor View housing community on the island of St. Croix in the U.S. Virgin Islands. (J.A. pp. 152-153.) sometime during the early evening, Harvey left home and walked to the parking lot near her apartment. There, her brother Maurice, and her cousin, Appellant Kwanzaa Martinez, ("Appellant" or "Martinez") were holding a conversation. (J.A. p. 153.) Harvey testified that later on that evening, she got into Martinez' car with the expectation that Martinez would drive her to her friend Amanda's apartment. (J.A. p. 155.) However, Martinez drove off with Harvey in the vehicle and sped past Amanda's house.(J.A. p. 156.) Harvey testified that Martinez' conduct was unexpected, and after it was clear to her that he did not intend to take her immediately home, she asked to be returned home. (J.A. p. 157.) Martinez was unresponsive to her pleas and as a result, Harvey reached for the steering wheel in an attempt to make Martinez stop. (J.A. p. 157.)

Harvey further testified that Martinez told her to stop grabbing the steering wheel because he had a gun in the car and did not want the police to stop him. (J.A. p. 157.) Martinez continued to drive for several minutes navigating the sharp corners and winding roads that twist along the northern shore of St. Croix, at high rates of speed. (J.A. p. 158.) Harvey testified that she feared for her life during this drive. (J.A. p. 158.) Eventually, Martinez drove past Salt River, to an isolated location near a steep hill nicknamed "the beast" and stopped the vehicle at a dead end road. (J.A. p. 158.) This location was approximately ten miles from Harvey's intended destination. (J.A. p.

158.) Harvey further testified that once the vehicle stopped, Martinez asked her for sex; a request she pointedly declined. (J.A. p. 158.) Martinez then told Harvey to get out of the car, which she did. (J.A. p. 158-159.) Martinez then left the area. (J.A. p. 159.) At that point, Harvey was alone in the isolated area near Salt River at approximately 9:00 p.m. (J.A. p. 159.) Harvey begged and screamed for help. (J.A. p. 159.) Martinez returned approximately five minutes later. (J.A. p. 159.) Harvey testified that when Martinez returned, she opened the rear door of the vehicle and got into the back seat, Martinez then dragged her out of the vehicle by her right hand at which time a struggle ensued. (J.A. p. 159.) According to Harvey, Martinez ordered her to take off her underwear, which she did, and forced her to engage in various acts of vaginal and oral sexual intercourse on the trunk and in the back seat of the vehicle. (J.A. pp. 160- 162.) Harvey testified that Martinez told her that he would shoot her if she told anyone they had sex. (J.A. pp. 162, 164-165.) Martinez then drove Harvey home in silence. (J.A. p. 165.)

Two days after the incident, Harvey told her brother, sister and mother about the attack. (J.A. pp. 168-170.) Her mother then took her to the hospital. (J.A. pp. 167-169, 174.) A criminal investigation ensued. Martinez' DNA was found on Harvey's panties and on the back seat of the car. (J.A. p. 89.) Investigators also recovered Harvey and Martinez' DNA from the back seat of the car that Martinez was driving. (J.A. pp. 91, 93.) Subsequently, Martinez was charged in a six (6) count Information for the crimes of Aggravated Rape in the First Degree; Aggravated Rape in the Second Degree; Kidnaping for Rape; Possession of a Deadly or Dangerous Weapon During

the Commission of a Crime of Violence; and two counts of Unlawful Sexual Contact in the First Degree. On April 28, 2004 the parties selected a jury and proceeded to trial. At trial, Martinez took the stand and testified that Harvey attempted to solicit money from him. (J.A. pp. 346-347.) Martinez also testified that Harvey told him that she would make a false accusation of rape if she did not get the money she requested. (J.A. pp. 349-350.)

At the close of evidence, the court instructed the jury as to the elements of Kidnaping for Rape. (J.A. p. 506.) However, the court omitted the element of force or threat in that offense. After the initial instruction, the jury was re-instructed with a curative instruction which included the element of force or threat in the court's revised instruction. (J.A. pp. 521-522.) After a three day trial, the jury acquitted Martinez of: Aggravated Rape in the First Degree; Possession of a Deadly Weapon During the Commission of a Crime of Violence; and the two counts of Unlawful Sexual Contact of the First Degree.[1]

The jury returned a guilty verdict on Count III, Kidnaping for Rape in violation of 14 V.I.C. §1052 (b). On July 23, 2004 the trial court denied Martinez' Motion for Judgment of Acquittal, for a New Trial and for an Arrest of Judgment. (J.A. p. 25.) On August 20, 2004, the trial court sentenced the Appellant to a term of thirty (30) years incarceration with credit for time served, Subsequently, Martinez filed this timely appeal.

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[1] The court previously dismissed Count II, the charge of Rape in the Second Degree.

III. DISCUSSION

A. Jurisdiction and Standards of Review

We exercise jurisdiction[2] to review the final judgment in this criminal matter. This Court may review the judgments and orders of the Superior Court in criminal cases. *See* V.I. Code Ann. tit. 4 § 33 (1997 & Supp. 2001). We review *de novo* questions of law, issues implicating rights protected under the U.S. Constitution, and the interpretation of statute. However, we afford the more deferential clear error review to factual determinations. *See Government of V.I. v. Albert,* 89 F.Supp.2d 658, 663 (D.V.I. App. Div. 2001).

B. Whether the evidence at trial was sufficient to sustain Appellant's conviction of Kidnapping for Rape.

"Whoever abducts, takes or carries away any person by force or threat with the intent to commit rape." V.I. Code Ann. tit. 14 § 1052 (b) . The standard of review to determine whether the evidence was sufficient to sustain Appellant's conviction is a question of law over which we exercise plenary review. *Sanchez v. Government of the Virgin Islands,* 921 F. Supp. 297, 299, 34 V.I. 105 (D.V.I. APP. 1996); *Smalls*

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[2] See also Revised Organic Act § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1994), reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2003) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"].

v. Government of the Virgin Islands, 1994 U.S. Dist. LEXIS 6286, 31 V.I. 121 (D.V.I. APP. 1994).

The Appellant who challenges the sufficiency of the evidence bears a heavy burden. *United States v. Navarro,* 145 F.3d 580, 692 (3d Cir. 1998). He must prove that, even when the evidence, both direct and circumstantial, is viewed in the light most favorable to the verdict, even when the Government is given the benefit of all inferences drawn from it; that no rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *United States v. Palmas-Ruedas,* 121 F.3d 841, 855 (3d Cir. 1997).

In support of his argument, Appellant relies upon *Government of the Virgin Islands v. Berry,* 604 F.2d 221 (3d Cir. 1979). In *Berry,* the appellants forced their robbery victim to take a swim at Rainbow Beach before abandoning him at the beach. *Id.* The Third Circuit Court of Appeals, in applying 14 V.I.C. § 1052 to appellants' argument, found that there was insufficient evidence that they engaged in conduct which the Virgin Islands Aggravated Kidnapping statute prohibited. *Id.* However, since the court's decision in *Berry,* the Virgin Islands legislature enacted 14 V.I.C. § 1052(b) (Kidnapping for Rape), which proscribes abduction with the intent to commit rape and defines such abduction as kidnapping.[3]

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[3] In 1983, the Virgin Islands Legislature amended V.I. Code § 1052, denoting the existing provision as § 1052(a) and adding a new subsection (b), which provides: Whoever abducts, takes or carries away any person by force or threat with *the* intent *to* commit rape is guilty of kidnapping and shall be imprisoned for

Martinez was convicted of the latter crime; Kidnapping for Rape, in violation of 14 V.I.C. § 1052(b).

The Third Circuit Court of Appeals first interpreted the Virgin Islands Kidnapping for Rape statute in *Government of the Virgin Islands v. Ventura,* 775 F.2d 92 (3d Cir. 1985). In *Ventura,* the Court held that in determining whether a Kidnapping for Rape occurred, two factors must be considered 1) any significant danger to the victim independent of rape; and 2) the duration of the asportation. *Ventura,* 775 F.2d at 97.

Appellant argues that Harvey initially entered the vehicle voluntarily and as such, the elements of Kidnapping for Rape were not proven beyond a reasonable doubt because no kidnapping or asportation took place. (App. Brief p. 10.) Appellant further argues that when he returned, after temporarily abandoning Harvey on an isolated road in the dark, that she again voluntarily re-entered the vehicle. Hence, Appellant argues because no abduction or asportation took place, there was insufficient evidence to support the jury's finding that Harvey was "carried away by threat or force". *See* 14 V.I.C. § 1052(b); (App. Brief p. 11.) We disagree.

Even if Harvey initially entered the vehicle voluntarily, a rational juror could find that her consent was withdrawn in one of several circumstances testified to at trial: first, when Martinez drove past Harvey's intended destination; second, when she began

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not less than 15 years and shall not be eligible for parole until he has served at least one-half of sentence imposed.

begging and pleading for Martinez to stop.[4] Additionally, a rational juror could find that Harvey was carried away by threat or force when Martinez told her to stop grabbing the steering wheel because he had a gun in the car.

Appellant also makes the conclusory argument that the duration of asportation was minimal in scope and a rational juror could not find that it exposed Harvey to any significant danger. (Appellant's Brief p. 12.) We disagree. A rational juror could conclude that the evidence of Harvey's drive from Harbor View, to a destination past Salt River, satisfied *Ventura's* duration of asportation consideration. *See Ventura*, 775 F. 2d at 98 (holding that Appellant who dragged his victim eighty-eight feet satisfied the duration of asportation consideration.) Moreover, Harvey testified that she was driven miles away from her home, at high rates of speed, with a man who threatened to have a gun. Given this evidence, a rational juror could also find beyond a reasonable doubt that Appellant posed a significant danger to Harvey independent of whether a rape occurred. Accordingly, we conclude that the evidence at trial was sufficient to support a conviction of Kidnapping for Rape, in violation of 14 V.I.C. § 1052 (b).

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[4] In a kidnapping context, even if a victim initially goes voluntarily with a defendant, if at any point her consent is withdrawn, defendant's use of force or fear to continue the asportation over a substantial diatance constitutes kidnapping. *People v. Camdem,* 548 P.2d 1110, 1113 (1976); *People Brown,* 622 P. 2d 109 (Col.App. 1980).

C. Whether the trial court committed reversible error in its reading of the jury instructions.

Appellant argues that the trial court committed reversible error in failing to properly instruct the jury on the statutory elements of Kidnapping for Rape. Appellant failed to object to the jury instructions at trial. Where appellant makes no objection at trial to the court's jury instructions, they are reviewed only for plain error; reversal is sparingly used only to correct what otherwise would result in manifest injustice. *Rabess Government,* 30 V.I. 348 (1994); *Government of the Virgin Islands v. Smith,* 949 F. 2d 677, 681 (3d Cir. 1991). Plain errors are defects affecting substantial rights. Fed. R. Crim P. 52. An error affects a substantial right if the error was prejudicial to the defendant and affected the outcome of trial. *United States v. Olano,* 507 U.S. 725, 736 (1993).

In this case, Appellant argues that the jury instructions were incorrect. Incorrect jury instructions may be corrected with a curative instruction. *Cupp v. Naughten,* 414 U.S. 141, 146-147 (1973) (finding no due process violation where improper jury instruction was accompanied by curative instruction). *Id.* at 147. As the Third Circuit Court of Appeals' holding in Olgin states, "[a]ny harm caused by the trial judge's comments or questioning of witnesses was remedied by the curative instruction given to the jury." *United States v. Olgin,* 745 F.2d 263, 269 (3d Cir. 1984). In order to effect a cure, the supplementary instruction must address the error in the original instruction and provide the proper instruction in its stead. *Id.* at 269, In this case, the record reveals a direct cure.

Title 14 V.I.C. § 1052(b) reads:

> Whoever abducts, takes or carries away any person by force or threat with the intent to commit rape is guilty of kidnapping and shall be imprisoned for not less than 15 years and shall not be eligible for parole until he has sewed at least on-half of sentence imposed.

The jury was initially instructed at trial in the following manner:

> [B]efore you may find the defendant guilty of kidnaping for rape as charged in count 3, you must find that the government has proven each of the following essential elements beyond a reasonable doubt: That the defendant and no other person, did knowingly and intentionally and unlawfully abduct take or carry away Chenae Harvey; that the defendant acted with specific intent when he unlawfully abduct[ed], took, or carried away Chenae Harvey with the specific intent to commit rape; that these acts occurred on or about Jun 16, 2003 in St. Croix, United States Virgin Islands. (J.A. p. 506.)

Initially, the court's reading of the jury instruction failed to track the statute because it did not contain the element "by threat or force." However, the court cured this error and the jury was re-instructed in the following manner prior to retiring for deliberation:

> Ladies and gentleman of the jury, in describing to you the elements of the kidnapping for rape, Count 3, I did indicate to you that under the laws of the Virgin Islands it is an offense to

> abduct, take or carry away any person by force or threat with the specific intent to commit rape. What I failed to do in listing the elements is to include force or threat, so that I will repeat. (J.A. pp. 521-522.)
>
> Before you may find the defendant guilty of kidnapping for rape as charges in Count 3, you must also find that the government has proven each of the following essential elements beyond a reasonable doubt: That the defendant knowingly and intentionally and unlawfully did abduct, take or carry away Chenae Harvey; that the defendant used force or threat against Chenae Harvey; that the defendant acted with specific intent to commit rape; and that all this conduct took place on June 16, 2003 in St. Croix, U.S. Virgin Islands. (J.A. pp. 521-522.)

The court's revised instructions directly cured any initial error that may have taken place. Accordingly, this court cannot conclude that a plain error occurred at trial.

D. Whether the prosecutor violated Appellant's Fifth Amendment right to Due Process by questioning Appellant regarding his post-arrest silence.

1. Doyle Violation

Generally, a prosecutor may not cross examine a criminal defendant about his post-arrest silence "because its prejudicial effect substantially outweighs its probative value." *See Doyle v. Ohio,* 426 U.S. 610 (1976) (citations omitted); *United States v. Johnson,*

302 F.3d 139, 146 (3d Cir. 2002). Thus, the United States Supreme Court has held that a prosecutor's questions or remarks about a defendant's post-arrest silence may, under some circumstances, violate the defendant's Due Process protections. *Doyle,* 426 U.S. at 618-619.[5] However, ". . .the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Id.* at 619. The court should address five factors when addressing alleged *Doyle* violations: 1) how the prosecution used the defendant's silence; 2) whether the defendant or the prosecution initiated reference to the post-arrest silence; 3) the intensity and frequency of the reference; 4) the quantum of other evidence of guilt; and 5) whether the trial court issued a curative instruction. *(See, e.g., Greer v. Miller,* 483 U.S. 756 (1987)); *United States v. Johnson* 302 F.3d 139, 148 (3d Cir. 2002).

In this matter, Martinez took the stand in his own defense. On direct and cross examination, Martinez testified that on the day in question, Harvey demanded money from him and threatened to accuse him of sexual misconduct if she did not get money. (J.A. pp. 346, 350, 358.) On cross-examination, the following exchange took place:

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[5] The prohibition against using a Defendant' s post-arrest silence is intended to curtail government over-reaching. "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment Privilege when he is under police custodial interrogation. The prosecution, may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Miranda v. Arizona*, 384 U.S. 436, 468 (1968).

[Prosecutor]:	Did you tell Ms. Martinez that Chenae might be in some trouble and needed 5 or $600?
[Martinez]:	No, sir.
[Prosecutor]:	Did you tell your mother that Chenae demanded 5 or $600 from you?
[Defense Counsel]:	Objection, your honor
[Court]:	Overruled
[Prosecutor]	Did you tell your mother that Chenae was trying to shake you down for 5 or $600?
[Defense Counsel]:	Objection as to shake down.
[Court]:	Sustain
[Prosecutor]:	Did you tell anyone other than today Chenae demanded 5 or $600 form [sic] you?
[Defense Counsel]:	Objection, your honor
[Court]:	Overruled.(J.A. pp. 359, 360.)

During cross-examination the prosecutor initiated questioning that sought to elicit testimony regarding Martinez' silence. Defense counsel requested a sidebar, at which time counsel argued that the prosecutor's questioning impinged upon Martinez' privilege against self-incrimination. (J.A. p. 361.) The trial court overruled counsel's objection because it believed the object of the Government's questioning was to indicate that Appellant recently made up the story. (J.A. p. 361.)

As an initial matter, we are particularly concerned with the prosecutor's question: "Did you tell anyone other than today Chenae Demanded 5 or $600 form [sic] you?" (J.A. p. 360.) Here, this cross-examination question regarding Martinez' post-arrest silence was

overly broad and its breadth and obscurity affect the applicable review in this matter. This question did not limit or specify a time frame during which Martinez may have spoken to anyone regarding the money Harvey allegedly requested from him. Moreover, it is also unclear whether this question was regarding Martinez' silence to law enforcement, or to anyone in general including family members, friends, etc. As such, this Court must presume that the prosecutor meant what he asked: whether Martinez spoke with anyone, including law enforcement at anytime, including pre-arrest pre-Miranda, up to trial. Considering the sanctity of Appellant's Constitutional privilege at stake, we shall construe the question posed to Martinez to address his post-Miranda, post-arrest silence to law enforcement.

In this case, the prosecutor argues that its questioning was intended to impeach Martinez' testimony on direct examination. We are unconvinced. On direct examination, Martinez did not claim to have told the police or anyone else an exculpatory story after arrest. Martinez did not imply that he had participated actively in the investigation, and never suggested that he had surrendered his right to silence by speaking directly with the authorities. Therefore, the prosecutor's question implicated Martinez' right to remain silent more than it constituted probative questioning of his truth or credibility. *See Hassine v. Zimmerman,* 160 F.3d 941, 949 (3d Cir. 1998).

The prosecutor's line of questioning was similar to other questions that have been found to violate a defendant's Due Process protections under *Doyle. See, e.g., Woods v. Gov't of the Virgin Islands*, 2006 U.S. Dist. LEXIS 59367 (D.V.I. 2006) (holding that a

prosecutor unconstitutionally commented upon a criminal defendant's post-arrest silence when he asked the defendant in cross examination whether he told *anyone about* his self-defense theory). This type of questioning is impermissible under *Doyle*. *See Doyle*, 426 U.S. at 619; *Hassine*, 160 F.3d at 949; *United States v. Gant*, 17 F.3d 935, 941 (7th Cir. 1994). Accordingly, Martinez' direct testimony did not justify the Government's painted cross examination that referenced Martinez' silence.

2. Harmless Beyond a Reasonable Doubt

Having found a violation of Martinez' constitutional rights, under *Doyle*, we turn next to the issue of whether the error can be characterized as harmless. A *Doyle* violation warrants reversal only if it was not harmless beyond a reasonable doubt. *Davis v. Virgin Islands*, 2007 U.S. Dist. LEXIS 37187 (D.V.I. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). The Supreme Court has written that "*Doyle* error fits squarely into the category of constitutional violations which we have characterized as trial error." *Brecht v. Abrahamson*, 597 U.S. 619, 629 (1993) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991)). Such constitutional errors are subject to harmless error analysis under the "harmless-beyond-a-reasonable-doubt standard." *Brecht*, 507 U.S. at 630 (citing *Chapman v. California*, 306 U.S. 18 (1967)). Moreover, *Doyle* violations have previously been recognized as harmless beyond a reasonable doubt where the evidence against the defendant is "overwhelming." *United States v. Dunbar*, 767 F.2d 72, 76 (3d Cir. 1985).

In the case *sub judice*, there is no dispute that Martinez took Harvey away from her home and drove her to an isolated destination. In the instant trial, there was an eye-witness identification and an account of the crime by the victim who testified that Martinez drove her away from home against her will and that he said he had a gun in the car. The jury also heard testimony that Martinez drove at a dangerously high rate of speed before he: forced Harvey to leave the vehicle in the dark of the night; had sex with her and after having sex; threatened to kill Harvey if she told anyone. Finally, Harvey's and Martinez' DNA were both found on Harvey's panties and in the vehicle Martinez was driving on the night in question.

In applying the *Chapman* harmless beyond a reasonable doubt standard, the evidence of Martinez' guilt presented at trial was overwhelming. Based on the evidence adduced at trial, even without the prosecutor's inappropriate question, the jury could have determined that Martinez did take Harvey away by threat or force with the intent to rape her. *See, e.g., Woods v. Gov't of the Virgin Islands,* 2006 U.S. Dist. LEXIS 59367 (D.V.I. 2006) ; *Balter,* 91 F.3d at 440; *see also, United States v. Rodriguez,* 43 F.3d 117, 123 (5th Cir. 1995) (holding that a prosecutor's questions to the defendant about his post-arrest silence, which did not refer to a specific time period, were harmless error). Thus, while this Court does not approve of the prosecutor's question about Martinez' post-arrest silence, the *Doyle* violation in this case rises only to the level of harmless error.

E. Whether the trial court erroneously admitted hearsay testimony.

Appellant argues that the trial court impermissibly allowed hearsay testimony into evidence. Specifically, Appellant argues that Harvey's testimony that she told her brother, mother and a friend about the incident and was taken to the hospital as a result was hearsay in the form of an oblique narrative. (J.A. pp. 167-169).[6]

Admission of evidence and testimony is discretionary and is reviewed for abuse of discretion, but, to the extent the trial court's ruling turns on an interpretation of those rules, the review is plenary. *Government of the Virgin Islands v. Petersen,* 131 FP. Supp. 2d 707, 709-710 (D.V.I. 2001); *See Government of the Virgin Islands v. Texido,* 43 V.I. 217, 89 F. Supp. 2d 680, 683 (D.V.I. App. Div. 2000); *Charleswell v. Government of the Virgin Islands,* 167 F.R.D. 674, 678 (D.V.I. App. Div. 1996); *Rivera v. Government of the Virgin Islands,* 635 F. Supp. 795, 798 (D.V.I. App. 1986).

Federal Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). It is well settled that evidence is inadmissible hearsay if its probative value depends on the truth of any assertion of fact it contains or on the

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[6] An oblique narrative occurs when one party relates to a jury what he or she did in response to another party's statement, or what someone did in response to the witness's statement. *See United States v. Reynolds,* 715 F.2d 99, 101 (3d Cir. 1983).

credibility of someone not available for contemporaneous cross-examination, and if it does not fall within one of the exceptions to the hearsay rule. *United States v. Reynolds*, 715 F.2d 99, 101 (3d Cir. 1983). However, out-of-court statements are not always hearsay. Thus, the Federal Rules of Evidence explain that "if the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Fed.R.Evid. 801(c) Advisory Committee Note; *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950).

In this matter, the contested evidence concerns Harvey's testimony that she spoke with her brother, her mother and friends about the incident two days after its occurrence and was taken to the hospital as a result. At trial, Defense Counsel objected to the Government's line of questioning regarding conversations Harvey had with her friends and family members. (J.A. pp. 167-169.) The trial court overruled Defense Counsel's objections concerning Harvey's testimony that she spoke with certain people about the incident. (J.A. p. 168.) However, the trial court sustained defense counsel's objections concerning the substance of those conversations and potential testimony regarding the effect of those conversations on the listeners. (J.A. pp. 170, 172-174.) Accordingly, the statements admitted at trial were not hearsay.[7]

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[7] Evidence of Harvey going to the hospital as a result of reporting the incident to her friends and family, is not the type of assertive non-verbal conduct that could be construed as a prohibited hearsay 'statement'. *See* Fed. R. Evid. 801(c) advisory committee's note (defining assertive nonverbal conduct, such as the act of

Therefore, the trial court did not abuse its discretion by allowing Harvey's testimony into evidence.

IV. Conclusion

For the reasons cited above, there was sufficient evidence to convict Appellant of Kidnapping for Rape and the trial court properly instructed the jury on the statutory elements of Kidnapping for Rape. Although the prosecutor's questioning regarding Appellant's post-arrest, post-Miranda silence was impermissible, it did not rise to the level of reversible error and the trial court did not err in permitting Harvey's testimony that she told her brother and mother about the incident. Accordingly, for the reasons cited above, Appellant's conviction is hereby AFFIRMED.

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pointing to identify a suspect in a lineup, as the equivalent of words, assertive in nature, and to be regarded as a statement).

APPENDIX C

*** NOT FOR PUBLICATION ***

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX APPELLATE DIVISION

D.C. CRIM. APP. NO. 2004/148

[Filed February 27, 2008]

KWANZAA MARTINEZ,	)
	)
Appellant,	)
	)
v.	)
	)
GOVERNMENT OF THE VIRGIN ISLANDS,	)
	)
Appellee.	)
	)

Re: Sup.Ct.Crim. 228/2003

On Appeal from the Superior Court of the Virgin Islands

Considered: June 15, 2007
Filed: February 26, 2008

BEFORE: **CURTIS V. GÓMEZ**, Chief Judge, District Court of the Virgin Islands; **RAYMOND L.**

FINCH, Judge of the District Court of the Virgin Islands; and **AUDREY L. THOMAS**, Judge of the Superior Court of the Virgin Islands, sitting by Designation.

ATTORNEYS:

Stephen Brusch, Esq.
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Attorney for Appellant.

Maureen Phelan, AAG
St. Thorns, U.S.V.I.
Attorney for Appellee.

ORDER

Per Curiam.

AND NOW, for the reasons more fully stated in a memorandum Opinion of even date, it is hereby

ORDERED that the Appellant's conviction is hereby **AFFIRMED**.

SO ORDERED this 26 day of February, 2008.

ATTEST:

WILFREDO F. MORALES

Clerk of the Court

By: /s/_____

Deputy Clerk

Copies (with accompanying Memorandum) to:

Judges of the Appellate Panel
Jomo Meade, Esq.
Maureen Phelan, Esq.
Wilfredo F. Morales
Queen Terry
Bridget Hodge
Semaj I. Johnson

APPENDIX D

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CRIMINAL NO. 228/2003

[Filed August 20, 2004]

THE GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiff,	)
v.	)
KWANZA RASHEED ALONZO MARTINEZ, (D.O.B. December 10, 1981)(SS#: 580-23-3492)	)
Defendant.	)

KIDNAPPING FOR RAPE

JURY TRIAL DEMANDED

JUDGMENT and COMMITMENT

THIS CAUSE came on for sentencing on August 20, 2004. The Defendant appeared personally and with counsel Stephen A. Brusch, Esq. Lori J. Williams, Esq., Assistant Attorney General represented Government of the Virgin Islands. On April 29, 2004,

a Jury found Defendant not guilty of Counts One, Four, Five and Six of the Amended Information; and guilty of violating Count Three of the Amended Information, to wit: Kidnapping for Rape, in violation of Title 14, V.I.C. § 1052(b); and. The Court dismissed Count Two of the Amended Information.

The premises considered, it is

ORDERED, ADJUDGED and DECREED that the **Defendant Kwanza Rasheed Alonzo Martinez is remanded to at care, custody and control of the Director, Bureau of Corrections for incarceration for a period of thirty (30) years, with credit for time already served in pretrial detention to wit: 409 days (July 9, 2003 to August 20, 2004).**

ORDERED, ADJUDGED and DECREED that Count Two of the Amended Information is DISMISSED WITH PREJUDICE.

ORDERED, ADJUDGED and DECREED that Defendant pays Court cost of $75.00.

Dated: August 20th, 2004

/s/Edgar D. Ross
EDGAR D. ROSS
Judge

ATTEST:
DENISE D. ABRAMSEN
Clerk of the Court

By: /s/Geralda A. Miller
Geralda A. Miller 8/20/04

Chief Deputy Clerk

CERTIFIED TO BE A TRUE COPY
THIS 20th day of Aug 2004
Denise D. Abramsen
CLERK OF THE COURT
/S/ _____ Deputy

APPENDIX E

STATUTORY PROVISIONS

4 V.I.C. § 33. Availability of appealable judgments and orders

(a) Appealable judgments and orders to the Supreme Court shall be available only upon the entry of final judgment in the Superior Court from which appeal or application for review is taken.

(b) Interlocutory review-civil. The Supreme Court of the Virgin Islands has jurisdiction of appeals from:

(1) Interlocutory orders of the Superior Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(c) Whenever the Superior Court judge, in making a civil action or order not otherwise appealable under this section, is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

advance the ultimate termination of litigation, the judge shall so state in the order. The Supreme Court of the Virgin Islands may thereupon, in its discretion, permit an appeal to be taken from the order, if application is made to it within ten days after the entry of the order; except that application for an appeal hereunder may not stay proceedings, in the Superior Court unless the Superior Court judge or the Supreme Court or a justice thereof orders a stay of the proceedings.

(d) Review-criminal.

(1) In a criminal case an appeal by the Government of the Virgin Islands shall lie to the Supreme Court from a decision, judgment, or order of the Superior Court dismissing an indictment or information or otherwise terminating a prosecution in favor of the defendant, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution or the Revised Organic Act prohibits further prosecution.

(2) An appeal by the Government of the Virgin Islands shall lie to the Supreme Court from a decision or order of the Superior Court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the Attorney General conducting the prosecution certifies to the Superior Court judge that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. The trial court shall adjourn or continue the trial until

the appeal is resolved. The appeal shall be determined promptly.

(3) An appeal by the Government of the Virgin Islands shall lie to the Supreme Court from a decision or order, entered by the Superior Court, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release. The appeal shall be determined promptly.

(4) An appeal by a defendant or person ordered detained pursuant to section 3504a, of title 5 of the Virgin Islands Code or other provision of law, shall lie to the Supreme Court from a decision or order, entered by the Superior Court, detaining a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order of detention. The appeal shall be determined promptly.

(5) The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

4 V.I.C § 76. Original jurisdiction

(a) Subject to the original jurisdiction conferred on the District Court by section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy; to supervise and administer estates and fiduciary relations; to appoint and supervise guardians and

trustees; to hear and determine juvenile, divorce, annulment and separation proceedings; to grant adoptions and changes of name; to establish paternity; to legitimize children and to make orders and decrees pertaining to the support of relations.

(b) Subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by sections 21 and 22 of the Revised Organic Act of the Virgin Islands, as amended, the Superior Court shall have original jurisdiction in all criminal actions.

14 V.I.C. § 1052. Kidnapping for ransom, extortion, robbery or rape

* * *

(b) Whoever abducts, takes or carries away any person by force or threat with the intent to commit rape is guilty of kidnapping and shall be imprisoned for not less than 15 years and shall not be eligible for parole until he has served at least one-half of sentence imposed.

14 V.I.C. § 1700. Aggravated rape in the first degree

* * *

(c) Whoever uses a deadly weapon during the commission of an act of rape as set forth in section 1701—

is guilty of aggravated rape in the first degree and shall be imprisoned for life or for any term of years, but not less than 15 years. Notwithstanding the provisions of Title 5, chapters 313, 405 and 407, Virgin

Islands Code, or any other provisions of law, imposition or execution of the fifteen-year minimum period of incarceration shall not be suspended; neither shall probation, parole, or any other form of release be granted for this minimum period of incarceration.

Whoever is convicted of a second or subsequent offense of aggravated rape in the first degree shall be punished by imprisonment for life or for any term of years, but not less than 25 years. Notwithstanding the provisions of Title 5, chapters 313, 405 and 407, Virgin Islands Code, or any other provision of law, imposition or execution of the twenty-five year minimum period of incarceration shall not be suspended; neither shall probation, parole, or any other form of release be granted for this minimum period of incarceration.

* * *

14 V.I.C. § 1700a. Aggravated rape in the second degree

(a) Whoever perpetrates an act of sexual intercourse or sodomy with a person who is under eighteen years but thirteen years or older and not the perpetrator's spouse, or by force, intimidation, or the perpetrator's position of authority over the victim is used to accomplish the sexual act, is guilty of aggravated rape in the second degree and shall be imprisoned for life or for any term in years, but not less than 10 years. "Position of authority" shall include, but not be exclusive to the following: an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, baby sitter, or substantially similar position, and a police officer or

probation officer other than when the officer is exercising custodial control over a minor.

* * *

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

48 U.S.C. § 1613a. Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for Third Circuit; rules; appeals to appellate court

(a) Appellate jurisdiction of District Court

Prior to the establishment of the appellate court authorized by section 1611 (a) of this title, the District Court of the Virgin Islands shall have such appellate jurisdiction over the courts of the Virgin Islands established by local law to the extent now or hereafter prescribed by local law: Provided, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency

of the Government of the United States, or the conformity of any law enacted by the legislature of the Virgin Islands or of any order or regulation issued or action taken by the executive branch of the government of the Virgin Islands with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

* * *

APPENDIX F

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CRIMINAL NO. 228/03

[Filed February 24, 2004]

THE GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiff.,	)
v.	)
KWANZA MARTINEZ, A.K.A., "KUANZA" MARTINEZ	)
Defendant.	)

CHARGE(S)
AGGRAVATED RAPE 1°
14 V.I.C. § 1700(c)
AGGRAVATED RAPE 2°
14 V.I.C. §1700a(a)
KIDNAPPING FOR RAPE
14 V.I.C. §1052(b)
POSSESSION OF A DANGEROUS OR DEADLY WEAPON DURING THE COMMISSION OF A CRIME OF VIOLENCE
14 V.I.C. §2251(a)(2)(B)

UNLAWFUL SEXUAL CONTACT 1° (2CTS)
14 V.I.C. § 1708(4)

AMENDED INFORMATION

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS charges that on or about June 16, 2003 in the vicinity of Salt River area, Scenic Route Road, Christiansted, in the Judicial District of St. Croix that:

COUNT ONE

KWANZA MARTINEZ, did perpetrate an act of sexual intercourse with a female minor, namely **C.H.**, when **C.H.'s** resistance was prevented by fear of immediate and great bodily harm which **C.H.** had reasonable cause to believe would be inflicted upon her person; namely, by Kwanza Martinez inserting his penis in **C.H.'s** vagina and using a deadly weapon, to wit, a firearm or imitation thereof during the commission of the act of rape, in violation of Title 14 V.I.C. §1700(c), **(AGGRAVATED RAPE IN THE FIRST DEGREE).**

COUNT TWO

KWANZA MARTINEZ, did perpetrate an act of sexual intercourse with a person under the age of eighteen (18), but thirteen (13) years or older, not his spouse, to wit, **C.H.**, who was sixteen (16) years old at that time, by inserting his penis in her vagina, in violation of 14 V.I.C. §1700a(a), **(AGGRAVATED RAPE IN THE SECOND DEGREE).**

COUNT THREE

KWANZA MARTINEZ, did unlawfully carry away, **C.H.**, a minor, by force or threat, with the intent to commit rape, to wit, by taking her from Harbor View Apartments to a deserted location in the Salt River area, Scenic Route Road for the purpose of raping her, in violation of Title 14 V.I.C. § 1052(b), **(KIDNAPPING FOR RAPE).**

COUNT FOUR

KWANZA MARTINEZ, with the intent to use the same unlawfully against another, did possess and have under his proximate control, a deadly or dangerous weapon, to wit, a firearm or imitation thereof, during the commission of a crime of violence, namely, Aggravated Rape in the First Degree, as charged in Count One of this Information, in violation of 14 V.I.C. §2251(a)(2)(B). **(POSSESSION OF A DANGEROUS OR DEADLY WEAPON DURING THE COMMISSION OF A CRIME OF VIOLENCE)**

COUNT FIVE

KWANZA MARTINEZ, did engage in sexual contact with a person not his spouse, namely, C.H., a minor, to wit, by intentionally touching her intimate parts, to wit, her vagina, with his mouth, to arouse or gratify his sexual desire, when C.H., was threatened or placed in fear or imminent danger, in that Kwanza Martinez did display and threaten the use of a deadly weapon, to wit, a firearm or imitation thereof, in violation of Title 14 V.I.C. §1708(4), **(UNLAWFUL SEXUAL CONTACT FIRST DEGREE).**

COUNT SIX

KWANZA MARTINEZ, did engage in sexual contact with a person not his spouse, namely, C.H., a minor, to wit, by intentionally forcing her to touch his intimate parts, to wit, his penis, with her mouth, to arouse or gratify his sexual desire, when C.H., was threatened or placed in fear or imminent danger, in that Kwanza Martinez did display and threaten the use of a deadly weapon, to wit, a firearm or imitation thereof, in violation of Title 14 V.I.C. §1708(4), **(UNLAWFUL SEXUAL CONTACT FIRST DEGREE).**

WHEREFORE, the Government requests that the Defendant be summoned to appear and be dealt with according to law.

RESPECTFULLY SUBMITTED

IVER A. STRIDIRON
ATTORNEY GENERAL

/S/LORI J. WILLIAMS
LORI J. WILLIAMS, ESQ.
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
6040 ESTATE CASTLE COAKLEY
CHRISTIANSTED, ST. CROIX, V.I. 00820

Dated: February 10, 2004

CERTIFICATE OF SERVICE

***

APPENDIX G

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CRIM. NO. ~~345/2003~~ 228/03

[Filed September 22, 2004]

THE GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiff.,	)
v.	)
KWANZA MARTINEZ,	)
Defendant.	)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Defendant, KWANZA MARTINEZ, by and through his undersigned attorney, Stephen A. Brusch, Esq., hereby appeals to the Appellate Division of the District Court of the Virgin Islands, Division of St. Thomas and St. John, from the Judgment of Conviction and Sentence, issued by Territorial Court of the Virgin Islands, Division of St. Croix (Hon. Edgar Ross), and imposed on August 20, 2004. The defendant shall raise, *inter*

alia, the issue of the insufficiency of the evidence to sustain a verdict of guilt.

THE BRUSCH LAW FIRM

DATED: September 1, 2004

BY:/s/Stephen A. Brusch,
STEPHEN A. BRUSCH, ESQ
International Plaza, Suite 2G
P.O. Box 988
St. Thomas, U.S.V.I. 00804
Telephone: (340) 776-2237
Telecopier: (340) 776-2238

17th Sept. 04
/s/S. Turnbull

APPENDIX H

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CRIMINAL NO. 228/03

[Dated April 27, 2004]

THE GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiff.,	)
v.	)
KWANZA MARTINEZ,	)
Defendant.	)

CHARGES:
AGGRAVATED RAPE 1st DEGREE; AGGRAVATED RAPE 2nd DEGREE; KIDNAPPING FOR RAPE; UNAUTHORIZED POSS. OF A DANGEROUS WEAPON DURING THE COMM. OF A CRIME OF VIOLENCE; UNLAWFUL SEXUAL CONTACT 1st DEGREE (2 COUNTS) UNAUTHORIZED POSSESSION OF A FIREARM

Tuesday, April 27, 2004
Kingshill, St. Croix

The above-entitled action came on for JURY TRIAL before the Honorable EDGAR D. ROSS, Judge, in Courtroom Number 211.

SANDRA HALL
OFFICIAL COURT REPORTER
(340) 778-9750 Ext. 6701

[p.30] OPENING STATEMENT ON
BEHALF OF GOVERNMENT

and we thank you in advance for your time, your patience and your attention--but at the end of the day, whenever this case ends, we will ask that you return a verdict finding this defendant, Kwanza Martinez, guilty as charged of all counts. Thank you very much.

MR. BRUSCH: Your Honor, may we approach sidebar, your Honor?

THE COURT: You may.

(Counsel for all parties approached the bench and conferred with the Court, as follows:)

THE COURT: Yes, Attorney Brusch.

MR. BRUSCH: Yes, your Honor. Your Honor, with regards to the issue as to past sexual behavior, I submit the government opened the door on its opening statement, your Honor, and I'm allowed to bring the issue up on my opening statement. First of all, she portrayed she stated that the source of the DNA was Kwanza Martinez, your Honor. He was not the only source of the DNA in her panties, your Honor. And I

submit that I'm entitled to tell the jury that in opening statement.

THE COURT: Who other sources?

MS. WILLIAMS: The victim herself.

THE COURT: Just the victim?

MR. BRUSCH: No, your Honor. The

APPENDIX I

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CRIMINAL NO. 228/03

[Dated April 28, 2004]

THE GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiff.,	)
v.	)
KWANZA MARTINEZ,	)
Defendant.	)

CHARGES:
AGGRAVATED RAPE 1st DEGREE; AGGRAVATED RAPE 2nd DEGREE; KIDNAPPING FOR RAPE; UNAUTHORIZED POSS. OF A DANGEROUS WEAPON DURING THE COMM. OF A CRIME OF VIOLENCE; UNLAWFUL SEXUAL CONTACT 1st DEGREE (2 COUNTS) UNAUTHORIZED POSSESSION OF A FIREARM

Wednesday, April 27, 2004
Kingshill, St. Croix

The above-entitled action came on for JURY TRIAL before the Honorable EDGAR D. ROSS, Judge, in Courtroom Number 211.

SANDRA HALL
OFFICIAL COURT REPORTER
(340) 778-9750 Ext. 6701

[p.10] HARVEY - DIRECT - PONTEEN

Martinez go after you - -

MR. BRUSCH: Objection as to whether he knows, your Honor.

BY MR. PONTEEN:

Q Do you know where Kwanza went to?

A No, I don't know.

Q Okay. And did you see Kwanza again that evening?

A No.

Q Now, sir, I would like to draw your attention to June 18th of 2003, two days later. Did you have occasion to be at the Juan Luis Hospital?

A Yes. I arrive in the night.

Q And were you there by yourself?

A Yes. I met my mom, Chenae and the rest of the police officers there.

Q Now, do you remember speaking to any police officers that evening?

MR. BRUSCH: Your Honor, objection, your Honor; call for hearsay. It's irrelevant and also under Virgin lands Code Title 5 Section 885; and to the extent the Federal Rules of Evidence apply, also 403, your Honor.

THE COURT: Overrule the objection.

BY MR. PONTEEN:

[p.11] C. HARVEY – DIRECT – WILLIAMS

Q Do you recall speaking to any police officers that evening?

A It had some officers there that I spoke to, but I can't recall now.

MR. PONTEEN: I have nothing further at this time, your Honor.

MR. BRUSCH: I have no question for this witness, your Honor.

THE COURT: Thank you, Mr. Harvey. You may step down.

Who is your next witness?

MS. WILLIAMS: Government call Chenae Harvey.

CHENAE HARVEY,

having been called as a witness, and having been first duly sworn by the clerk of the court, was examined and testified, as follows:

DIRECT EXAMINATION

THE COURT: Ms. Harvey, I ask that you pull your chair close to the microphone and speak into the microphone at all times.

BY MS. WILLIAMS:

Q Good morning.

A Good morning.

Q Can you try and elevate your voice a

[p.12]

little?

A Good morning.

Q Can you please state your name for the record?

A Chenae Lorencia Harvey.

Q Can you spell your name for the court reporter?

A C-H-E-N-A-E.

Q And Ms. Harvey, what is your birth date?

A July 12, 1986.

Q And how old are you today?

A I am 17 years old.

Q Where do you live?

A Harbor View, Building 2, Apartment 18.

Q Who lives there with you?

A My mother, Faye Martinez; my little brother, Jahmoy Williams.

Q Now, how long -- well, did you live at Harbor View last summer, June of 2003?

A Yes, I have lived Harbor View for about 17 years now.

Q Are you working, Ms. Harvey?

A I just got a job yesterday to McDonald's in Golden Rock.

Q Okay. Do you also attend school?

[p.13]

A Yes, Central High School. I am in 11 grade.

Q And last year you attended Central High School also?

A Yes, I was in the 10 grade.

Q You indicated that you lived in Harbor View and still live in Harbor View, is that correct?

A Yes.

Q Is that here in St. Croix, Virgin Islands?

A Yes.

Q Let me direct your attention to last summer, specifically June 16th, 2003. Were you at home that day?

A Yes, I was home.

Q And what were you doing in the late afternoon or early evening hours?

A I was in my friend, Amanda's, house and after that I came home.

Q Where does your friend, Amanda, live?

A In Harbor View.

Q Okay. You went home and what did you do?

A After I went home, I went in the parking lot where my brother, Maurice, and Kwanza was.

Q And who is Kwanza?

A My cousin.

[p.14]

Q And what is Kwanza's last name?

A Martinez.

Q Do you see Kwanza Martinez in this courtroom today?

A Yes.

Q Can you point to him and identify an article of clothing he has on?

A He is in a blue shirt right over there (indicating).

MS. WILLIAMS: May the record reflect that there's been an in-court identification of this defendant.

MR. BRUSCH: No objections, your Honor.

THE COURT: It may so reflect.

BY MS. WILLIAMS:

Q What happened when you saw your brother, Maurice, and Kwanza in the parking lot?

A They was over to the car. Kwanza was in the car. My brother was around the car. I came over to the car now. I sat in the passenger seat and Maurice and Kwanza went over to my brother friend car. Then after that, Kwanza then came back over to the car and said, let we go from here because I take something from Maurice friend car and I don't want him to see

[p.15]

what I have.

MR. BRUSCH: Objection, your Honor. Objection, your Honor. Objection, your Honor. Move to strike.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q You can finish your last sentence.

MR. BRUSCH: No foundation to make this statement, your Honor.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q You may finish your last sentence.

A Where was I?

Q You indicated -- was asking you what happened when you saw Maurice.

A Then after that, Kwanza came back to the car. He said, let we go from here. I don't want Maurice friend to see what I have.

Q When he said, let we go, who is he referring to?

A Who he is referring to?

Q You said Kwanza said, let we go. Who? Who is the we?

A Me.

Q And what happened next?

[p.16]

A After that we then drove off. We were supposed to go to Amanda house then turn around.

Q Let me stop you. Who was in the vehicle?

A Me and Kwanza.

Q And what vehicle was this? Whose vehicle?

A His mother.

Q You recall what kind of car it was?

A A gray Car. I don't know exactly what kind of car it is.

Q And when you -- so, you left to go where?

A To my friend house.

Q And where does your friend live?

A In Harbor View.

Q How are you to get to your friend house? How were you supposed to get to your friend's house?

A In the car. Just drive around and then we were supposed to just spin back around.

Q Did you ever get to your friend's house?

A No.

Q What happened?

A He then directly just speed by the house -- speed by the apartment.

Q Who is he?

A Kwanza.

Q Okay.

[p.17]

A He just kept on speeding. He didn't want to stop, so I found it strange. So I say, "Kwanza, where we going?" He didn't want to answer me. Then I say, "Kwanza I want to go home. I want to go home."

Q And what did he do?

A He didn't say anything. We reach to Lionel Gas Station.

Q Where is Lionel's Gas Station?

A In Princesse area.

Q And what happened at that point?

A Then I started to get vex. I say, "Kwanza, I want to go home. I want to fucking go home." And he didn't wanted to believe me and I was crying, crying. He didn't want to believe me.

Q And so, what happened then?

A Then after that I take my hand, I hold the steering wheel to move it to the right to maybe let him stop, so he didn't stop.

Q What did he do?

A So after that he said, Chenae, stop because I don't want any police to stop me because I have a gun in the car.

Q Then what happened?

A Then he just kept on speeding until he reach to Salt River side.

[p.18]

Q And what happened at Salt River?

A He was speeding around the corners. It had some sharp, sharp corners. He just speeding, speeding. I was so afraid of my life I thought we were going and die or something. I don't know what had happen to him that day.

So now we speeding, speeding. We reach to the Beast, the hill. We was going up the hill. I saw a sign that say Scenic Drive. I want to know where I –

Q When you say the Beast, this is the Beast where?

A The Beast through Salt River side, the hill that say the Beast.

Q Okay. And what happened at that point?

A So now, I see the sign say Scenic Drive. We went up a dirt road, a steep dirt road. Then we finally came to a stop, a dead end. He then turn around the vehicle, facing down the hill, the head lights facing down the hill. Then he stop the car, turn off the car, lock off the lights. He say, Chenae I want to have sex with you. I say, "No, I don't want to have sex with you because you is my cousin."

Q What did he say?

A If you don't want have sex with me, get

[p.19]

out of the car. So, I get out the car. He close the door. He then turn on the car and he drove off.

Q How long was he gone?

A About five minutes he left me there.

Q And what were you doing in that five minutes?

A I was screaming, screaming, begging for help. I didn't know what to do. It was so dark.

Q And who else was out there at that time?

A Me alone. And the area was pitch dark. It was about 9 something.

Q Did you see Kwanza again?

A Yes. He then come back. I say he come back for me to go home, so I was so happy. Then he just - - he spin around the car again and get into the same direction.

Now, I open the door; I get back in the car. He then turn off the car. He come around the car. Then he open the door; then he take me out of the car, drag me out by my right hand, take me out of the car. Then after that, we had a physical fight. Then he told me I need to take down my underwear and my pants. Well, I can't fight him. He stronger than me.

Q So, what did you do?

A I took down my pants and my underwear,

[p.20]

then he told me to bend over. He then went in the car, I guess to get a condom. He come back around. He put on the condom. That's when he started to have sex with me.

Q When you say he started could to have sex with you, what do you mean?

A His penis was towards my vagina and he was penetrating it into my vagina until it reach the end.

Q And what did he do at that point?

A He was keeping having sex with me.

Q And what were you doing?

A Then I was crying because it was hurting.

Q And did you say anything to him?

A No.

Q Why not?

A What could I say? I can't stop him from doing what he was doing to me.

Q And then what happened?

A He then stop. Then he tell me get up on the trunk of the car then I went up. Then he had sex with me again. Then he started to lick my vagina.

Q With what?

A His mouth.

Q And what happened at that point?

A What happen?

[p.21]

Q Yes.

A He was just licking his vagina -- his mouth was against my vagina.

Q Then after –

A Then after that he stop. Then he came back. I came down off of the car. Then he took his -- he threw away the condom in the bushes. Then after that he told me to get in the back of the seat, so I went in the back of the seat, then he had sex with me again without a condom. Then he was asking me, you like it. I say, "No, I don't like it." Then he tell me, well, say you like it. So I say -- I had to say I like it. Then after that it was over.

Q And what did he do?

A He get a white shirt and he told me to wipe off myself with it. I wipe myself. He wipe hisself (sic) then he just -- he put back the shirt in the car. Then I got back in the car.

Then he got back in the car and start up the car. Then we was ready to go. He then drove off to at least the bottom of the hill, the dirt road. Then he see a light, so he say, that's a light? That's a car? Then he reverse the car back.

Q And what happened when he reversed the car back?

[p.22]

A He stopped the car then he say, Chenae I want you suck my penis. He didn't say penis. He say, Chenae I want you suck my bud.

Q What did you think he was referring to?

A My mouth against his bud.

Q And his bud meaning what?

A Penis.

Q And so, what happened at that point?

A Then after that I say, "I don't want to do none of this."

Q And what did he say?

A He just grab my head against his penis and I had to suck it.

Q What happened after that?

A Then I come off of it. Then when I came off of it, I so vex I say, "I gon (sic) tell everybody what happen because I don't like what you do me tonight."

Q And what did he say?

A He say, well, if you tell anybody, I gon shoot you. Because he had the gun right there on his lap. He say, I gon shoot you.

Q And before that point, had you seen the gun?

MR. BRUSCH: Objection as to

[p.23]

leading, your Honor.

THE COURT: Overruled.

A Yes, I did.

BY MS. WILLIAM:

Q When and where did you see the gun?

A It was in the car -- first it was in the glove compartment. Then he took it out -- it was around Lionel Gas Station. He had it on his lap.

Q Then?

A Then up by the Scenic Drive, the dead end, I saw it. It was still there. He had it in the car, I guess, when he was having sex with me.

MR. BRUSCH: Objection to "I guess", your Honor.

THE COURT: Sustained.

MR. BRUSCH: Move to strike.

BY MS. WILLIAMS:

Q Where did you see the gun after you saw it in his lap around Lionel's Gas Station?

MR. BRUSCH; Objection; asked and answered your Honor.

THE COURT: Overruled.

A It was still in his lap when he was driving, speeding.

BY MS. WILLIAMS:

[p.24]

Q Where was the gun when you were at Scenic Drive when he had his penis inside of your vagina?

A First he had it outside before we start. He had it on the trunk of the car. Then after that, he put it in the car, I guess, to begin to having sex with me.

MR. BRUSCH: Objection to "I guess", your Honor. Move to strike.

THE COURT: Sustained. Ladies and gentlemen, when I strike a part of the testimony--in this case, I'm striking the "guess" of the witness, when she say "I guess" - -that portion of the testimony is stricken and you may not consider it in your deliberations. It's not part of the record.

You may proceed.

BY MS. WILLIAMS:

Q Now, where did you go after you said he made you have oral sex with him?

A Where did I go?

Q What happened next?

A After I done had oral sex?

Q You said he made you suck his penis?

A Yes.

Q What happened next?

A Then after that he was telling me -- I was

[p.25]

telling him I gon telling everybody what happen because I didn't like what do to me. Then he said, if you tell anybody, I gon shoot you.

Q And what happened at that point?

A Then after that he start off the car. I didn't say anything to him. We just drove back the same way we come up to Scenic Drive, the dead end. We drove straight back the same way back home and after that we reach home. I came out of the car. I didn't know where he went. I came out of the car, went upstairs and went into my bedroom.

Q What did you then?

A I went and take a bath. I was scrubbing, scrubbing, scrubbing, scrubbing my mouth because it was nasty.

Q How were you feeling at that point?

A I was in pain because my vagina was hurting.

Q Was anyone home?

A No, not at the time.

Q And did anyone come home at some point in time?

A Did anyone come home?

MR. BRUSCH: Objection as to leading, your Honor.

[p.26]

THE COURT: Overruled.

BY MS. WILLIAMS:

Q Who was at the house, your house?

A When I first came or –

Q At any point that evening, was anyone else in the house?

A Yes. My mother and stepfather came home from the movies.

Q And did you speak to –

A She ask me what was -- she call me. I came out

MR. BRUSCH: Objection as to her mother call and ask me, your Honor, It's hearsay, your Honor.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q Your mother called you?

A She called me outside. I guess she figured something was wrong.

MR. BRUSCH: Objection as to "I guess she figured", your Honor. Move to strike.

THE COURT: Ms. Harvey.

THE WITNESS: Yes?

THE COURT: Don't tell us what you guessed or speculated. Just tell us exactly what

[p.27]

happened.

THE WITNESS: Okay. She looked at me and ask me what was the problem. I said nothing. Then after that, I went back inside my bedroom.

BY MS. WILLIAMS:

Q Why didn't you tell your mother what happened?

MR. BRUSCH: Objection as to why, your Honor.

THE COURT: Overruled.

A Because I was frighten for my life because Kwanza Martinez –

BY MS. WILLIAMS

Q Because Kwanza Martinez –

A -- said he was going to kill me. And he had a gun, so I was afraid him.

Q And so, when was the first time you told anyone what happened?

MR. BRUSCH: Objection as to what she told, your Honor. It is not a fresh complaint; hearsay, your Honor, It's inadmissible.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q You may answer the question. When was the first time you told anyone what happened?

[p.28]

A Two days later.

Q And who was that?

A I told my bigger brother, William Harvey, first. So, I was talking to him, He told me, Chenae –

MR. BRUSCH: Objection as to what he told her, your Honor. It's hearsay. I continue my objection.

THE COURT: Attorney Williams, when an objection is made, wait until I rule before you continue your question.

MS. WILLIAMS: Oh, I'm sorry.

MR. BRUSCH: Your Honor, I continue my objection to any conversation she had with whoever she told, your Honor. It's hearsay.

THE COURT: I understand.

MR. BRUSCH: Sixth Amendment, also confrontation.

THE COURT: I understand.

You may continue. Objection's overruled.

BY MS. WILLIAMS:

Q After you had your conversation with your brother, when was the next time you told anyone what happened?

[p.29]

A First I told my big brother. He was telling me –

Q Without saying what he told you. After you spoke to him –

A I then called my sister, Chevelle Harvey.

Q And where does Chevelle live?

A She used to live with my father in town.

Q Here in St. Croix?

A Yes, here in St. Croix.

Q And as a result of -- you said you spoke to her?

A No. I didn't talk to she yet. I called; she wasn't home. Then she called me back.

Q And what happened after she called you back -- when she called you back?

A I then called my mother to work. She was at work. Then her friend came and bring her to the house. Then I went downstairs and then after that they took me to the hospital.

Q Who took you to the hospital?

A My mother and her friend.

Q You mentioned that you spoke to your sister, Chevelle?

A Yes.

Q And Chevelle called you back?

[p.30]

A Yes.

Q What, if anything, did you tell Chevelle?

MR. BRUSCH: Objection, your Honor.

THE COURT: Sustained.

A I told her - -

THE COURT: No. You don't have to answer, Ms. Harvey.

THE WITNESS: Oh.

MS. WILLIAMS: Your Honor, we would argue that this is an excited utterance, notwithstanding the fact this is two days later.

THE COURT: There is no predicate play to the acceptance of the excited utterance at this time.

BY MS. WILLIAMS:

Q When you had the conversation with the sister, Chevelle, where did that conversation take place? Where were you?

A I was at home.

Q And do you know where --

A At Harbor View, at home.

Q Do you know where?

A Yes. She was by my father house in town.

Q And what was your -- how were you when you were making that phone call to Chevelle?

[p.31]

MR. BRUSCH: Your Honor, I object. May we approach sidebar, your Honor?

THE COURT: You may approach sidebar.

(Counsel for all parties approached the bench conferred with the Court, as follows:)

THE COURT: Yes, Attorney Brusch.

MR. BRUSCH: Yes, your Honor. I object as to any conversation this witness had with the Chevelle, your Honor. It clearly cannot be considered excited utterance, your Honor, and there can be no foundation laid for excited utterance. I also objected to counsel, in effect, tipping off the witness when she says I wanted admitted as excited utterance, your Honor. This is two days later, your Honor. I find that it cannot be laid that this is excited utterance. It is too far away from the allocation, your Honor.

THE COURT: Attorney Williams.

MS. WILLIAMS: We would argue that the distance in time is not written in stone that it has to be right away, it has to be at this very moment. This is a situation where you have a individual who was traumatized by this incident. She held it in for two days. She finally told someone. At the time she was

[p.32]

telling her sister, Chevelle, we will submit that she was still under the trauma of what happened.

MR. BRUSCH: Your Honor - -

THE COURT: For the Court to conclude that she was still traumatized would be giving the Court to speculate as the testimony as it now stand. The Court would sustain the objection.

MS. WILLIAMS: You said the Court would speculate?

THE COURT: Yes. The Court would have to speculate as to the state of the witness.

MS. WILLIAMS: But she hasn't testified to how she was feeling at that time.

THE COURT: Excuse me?

MS. WILLIAMS: She has yet to testify.

THE COURT: Well, there is no predicate laid for the acceptance of an excited utterance.

MS. WILLIAMS: So, can the Court revisit this issue with her sister then?

THE COURT: The Court is what?

MS. WILLIAMS: Will the Court readdress this issue with her sister, Chevelle?

THE COURT: If necessary I will, but

[p.33]

the objection is sustained. Thank you.

(The proceedings had at the bench were concluded and this trial resumed, as follows:)

BY MS. WILLIAMS:

Q Ms. Harvey, what were you doing at the time that you were speaking to your sister, Chevelle?

A I was crying.

Q Why were you crying?

A Because I was –

MR. BRUSCH: I continue to object, your Honor.

THE COURT: Very well.

MS. WILLIAMS: I didn't hear.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q Why were you crying?

A Because I was frightened.

Q Frightened about what?

A About what happened to me when I got raped from Kwanza. And I was in pain still.

Q And this conversation took place when? What day was this?

A The 18th.

Q What was the nature of your conversation? What did you tell Chevelle?

[p.34]

MR. BRUSCH: Objection, your Honor.

THE COURT: Sustained.

BY MS. WILLIAMS:

Q After you had a conversation with Chevelle, what did you do?

MR. BRUSCH: Objection; has been asked and answered, your Honor; also hearsay because actions can be considered hearsay in addition to verbal statements or oral statements I should say.

THE COURT: Overrule the objection.

BY MS. WILLIAMS:

Q What did you do after you had your conversation with Chevelle?

A What did I do?

Q Yes.

A After I talk with her?

Q Yes.

A I then wait until -- I then called my mother. Then after that my mother came for me.

Q And where did you go?

A To the hospital.

Q Which hospital?

A Juan F. Luis Hospital.

Q What did you do once you got to the hospital? What happened? What happened then?

[p.35]

A Then they carry me to Dr. DaSilva. Then Dr. DaSilva did the checkup on me. Then in the room where I was with Dr. DaSilva I talk to two police, a policeman and a police woman.

Q And you mentioned -- let me take you back a little ways. You mentioned that you were up on a dirt road off of the Beast, is that correct?

MR. BRUSCH: Objection; been asked and answered, your Honor. If she is going to take her back to the testimony, it's been asked and answered.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q Is that correct?

A Can you please repeat the question?

Q You mentioned that this incident happened up off a dirt road?

A Yes.

Q Had you -- after that day, had you been back to that location or when was the next time you went back to that location?

A I can't remember exactly when, but I remember going up there again with Officer Hitesman.

Q And when you went with Officer Hitesman, approximately -- time of the day was it?

A It was in the day.

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MS. WILLIAMS: Your Honor, may I approach the witness?

THE COURT: You may.

MR. BRUSCH: Your Honor, may we approach sidebar, your Honor?

THE COURT: You may.

(Counsel for all parties approached the bench and conferred with the Court, as follows:)

MR. BRUSCH: I would have to object to this photograph. I just want to make sure that this is not relevant to the case.

MS. WILLIAMS: No.

THE COURT: You haven't seen it before?

MR. BRUSCH: I have seen it before.

THE COURT: You didn't ask a question then.

MR. BRUSCH: Your Honor –

THE COURT: Don't waste my time.

MR. BRUSCH: I apologize to the Court.

(The proceedings had at the bench were concluded and this trial resumed, as follows:)

BY MS. WILLIAMS:

Q Chenae, I am showing you what has been

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previously marked as Plaintiff's Exhibit No. l-A and 1-B. Do you recognize what's in your hand?

(The photographs were marked Plaintiff's Exhibit Nos. l-A and l-B for identification.)

(Handing.)

A Yes.

Q Can you tell us what it is?

A Show it?

Q No. You can just look at it and tell us what it is.

A This is where he brought me to the dead end through Scenic Drive.

Q He, meaning?

A He, meaning Kwanza Martinez. But when he carry me, it was pitch dark, around 9 something. And here they took the picture in the day.

Q And other than that difference, does that picture fairly and accurately depict the scene –

A No. The grass, everything is still the same.

Q So, it does fairly and accurately depict where you were on the night of June 16th, 2003?

A Yes.

MS. WILLIAMS: Your Honor, we move

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for admission of Plaintiff's Exhibits No. 1-A and 1-B.

MR. BRUSCH: No objections, your Honor.

THE COURT: It may be admitted.

(The photographs, heretofore marked Government's Exhibit Nos. 1-A and 1-B for identification, were received in evidence.)

BY MS. WILLIAMS:

Q Chenae, are you married?

A No, I'm not.

Q Have you ever been married?

A No.

Q Is Kwanza Martinez your husband?

A Husband?

Q How old were you on June 16, 2003?

A I was 16 years old.

Q You indicated you were at the hospital with Dr. DaSilva, correct?

A Yes.

Q What happened after that?

A After that, the policeman name Mr. Encarnacion came for us. He then carry us down to the AG's office.

Q Did you go anywhere before you went to the AG's office?

[p.39]

A No.

Q And let me take you back. What were you wearing on the night of June 16th, 2003?

A I was wearing a white shirt that had on my key on it, a jeans pants that goes a little bit further down by my knee and a colorful panty.

Q And what happened to those clothes? What did you do with them?

A I then gave it to Mr. Hitesman, Detective Hitesman.

Q Now, you mentioned Encarnacion earlier. Who did you give the clothes to?

A Hitesman. Officer Hitesman -- not Officer Hitesman; Officer Encarnacion.

Q But before you gave the clothes to Officer Encarnacion, where were those clothes?

A They was in my dirty hamper in a plastic bag.

Q Why did you put them there?

MR. BRUSCH: Objection as to why, your Honor.

THE COURT: Sustained. There is no testimony that she put them in a plastic bag.

BY MS. WILLIAMS:

Q And who put those clothes in a plastic

[p.40]

bag?

A Me.

Q Why did you do that?

A Because I know I was going –

MR. BRUSCH: Again, objection as to why, your Honor.

MS. WILLIAMS: Your Honor, I think it's relevant.

THE COURT: Overruled.

BY MS. WILLIAMS:

Q Why did you put your clothes in a bag?

A Because I know one day I would tell my mother and everybody what was going on, and I know we would needed them clothes or I would pitch them away.

Q And when did you put those clothes in your hamper in a bag?

A The same night I came home from the rape.

MS. WILLIAMS: Court's indulgence.

(Pause.)

BY MS. WILLIAMS:

Q Ms. Harvey, I am going to show you what has been previously marked as Plaintiff's Exhibit No. 2.

Can you please take a look at that item and tell us what it is. Without opening it, just look through the plastic.

[p.41]

(The item was marked Government' s Exhibit No.2 for identification.)

(Handing.)

A This is my panty I wear on the night of the rape.

Q And is that same panty you turned over?

A To Officer Encarnacion?

Q Yeah, is that same?

A Yes.

Q I'm also going to show you what has been previously marked as Plaintiff's Exhibit No. 2-B for purposes of identification and I will ask you to do the same thing. Can you tell us what that is?

(The item was marked Government's Exhibit No. 2-B for identification.)

(Handing.)

A This is the jeans pants, blue jeans pants I wear on the night of the rape.

Q And finally I am going to show you what has been previously marked as Plaintiff's Exhibit No. 2-A for purposes of identification?

(The item was marked Government's Exhibit No. 2-A for identification.)

(Handing.)

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A This is the white shirt I wore on the night of the rape.

Q And those three items are the same that you turned over to the Detective Encarnacion?

A Yes.

MS. WILLIAMS: I have nothing further at this time.

THE COURT: You may cross-examine.

MR. BRUSCH: Your Honor, at this time pursuant to Rule 26.2 of the Federal Rules of Criminal Procedure effected by Local Rule 7, I am asking for any statement of this witness that has not yet been provided to counsel, your Honor.

MS. WILLIAMS: Your Honor, counsel has everything that we have. We have tendered all discovery.

THE COURT: Very well. You may proceed.

CROSS-EXAMINATION

MR. BRUSCH:

Q Since June 16th, 2003, you have met a lot of times with the prosecutor, haven't you?

A Yes. I have raised up with him. He is my first cousin.

Q Please listen to the question. Since June

[p.43]

16th, 2003, you have met a lot of times with the prosecutor, Ms. Williams and Mr. Ponteen?

A Yes.

Q Number of times?

A Yes.

Q And they have gone over your testimony that you were to give in court today?

A Yes.

Q And when was the last time you met with either Ms. Williams or Mr. Ponteen?

A Just this morning.

Q Just this morning. And again went over your testimony you supposed to give in court today?

A No, I didn't.

Q But you did meet with them this morning?

A Yes.

Q And before then, when was the last time before this morning? When was the last time you met with Ms. Williams or Mr. Ponteen?

A Yesterday.

Q Yesterday. And before then?

A The day before that.

Q Now, you didn't go to school yesterday, did you?

A No, I didn't.

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Q And you didn't go to school Monday, did you?

A No, I didn't.

Q And don't expect to go to school today, do you?

A No. We have -- not a holiday, but we have a break for Carnival.

Q Now, on June 16th, 2003, you also were on summer holiday, right?

A Yes.

Q So, it was a break from school?

A Yes.

Q Just like today?

A Yes.

Q You didn't wear a uniform on June 16th, 2003, did you?

A No.

Q But you are wearing your school uniform today?

A Yes.

Q And you wore it on Monday?

A Yes.

Q And you wore it on Tuesday?

A Yes.

Q Now, when you testified on direct you said

[p.45]

that the first time you had sex with Kwanza Martinez on June 16th, 2003 that you were in the back of the car, correct?

A Repeat.

Q On direct examination you testified the first time you had sex with Kwanza Martinez on June 16th, 2003 you were in the back of the car?

MS. WILLIAMS: Objection as to –

A No.

BY MR. BRUSCH:

Q It was the back of the car?

A No -- yes.

Q Outside the car on the back of the car?

A Yes.

Q You said you had a fight with Kwanza Martinez?

A A physical fight.

Q Physical fight?

A Yes.

Q Now, and so, what was your position the first time you had sex with Kwanza Martinez?

A Repeat.

Q What was your position?

A What you mean by my position?

Q Well, when you had sex, was he facing you

[p.46]

or was he behind you?

A He was behind of me.

Q And where were your hands?

A On the car.

Q So, you were leaning over the car, correct?

A Yes, and bending over.

Q That's your testimony today; you were on the car leaning over and bending over, right?

A Yes.

Q But didn't you tell one of the officers you spoke to at the hospital that Kwanza threw you on the ground and raped you?

A I told him that because I was vex, I was hurting, I was crying and I was just saying everything. I was bawling, screaming, everything, so I could have told him that.

Q But that didn't happen?

A No. What I just said happened.

Q And you also said you were vexed, bawling crying and that's why you told him that he threw you on the ground and raped you?

A Yeah, I could have told him anything.

Q You testified to this jury that you saw Kwanza in the parking lot with your brother, Maurice,

[p.47]

right?

A Yes.

Q And you went into his car, that is, Kwanza's car or Kwanza's mother's car?

A Yes.

Q Now, did you tell the officer -- didn't you tell the officer at the hospital, Officer Berrios, the first time you saw Kwanza that evening kwanza was fixing his car?

A Fixing his car.

Q Yes.

A I can't recall telling him that.

MR. BRUSCH: Your Honor, I ask that the witness be shown what is marked as Defendant's Exhibit 2 for identification.

(The document was marked Defendant's Exhibit No.2 for identification.)

MS. WILLIAMS: Objection, your Honor; improper impeachment. If he wants to impeach the officer, let him do it through the officer, not this witness.

THE COURT: Overruled. The witness has testified she doesn't recall. He can use whatever he wants to refresh her recollection as to what she said.

[p.48]

MS. WILLIAMS: Your Honor, our objection is that this is not her statement she adopted.

THE COURT: Overruled. He can use anything he wants if it refreshes her recollection.

(Handing.)

BY MR. BRUSCH:

Q You have before you what has been marked for identification, Defense Exhibit No.2. I ask you to look at three lines down, the sentence towards the right corner that says, "That S," and read that to yourself.

A (Witness complies)

Q Do you see that sentence?

A Yes.

Q Now, so now, you do recall and you did state to Officer Berrios –

MS. WILLIAMS: Objection, your Honor.

BY MR. BRUSCH:

Q -- that the --

MR. BRUSCH: May I finish the question, your Honor?

THE COURT: Yes, you may finish the question.

[p.49]

BY MR. BRUSCH:

Q -- that you told him that Kwanza was fixing a vehicle in the parking lot?

THE COURT: Sustain the objection.

MS. WILLIAMS: Objection, your Honor.

THE COURT: As to the form of the question.

BY MR. BRUSCH:

Q Does -- reading the Defense Exhibit 2 for identification, does it refresh your recollection as to whether you told Officer Berrios –

A Yes, I told him that.

Q Now, you said that you got into the car and then Kwanza got into the car, right?

A Yes.

Q You said that Kwanza told you that he had something, but he didn't want Maurice's friend to see what he had, right?

A Repeat.

Q You testified on direct before this jury that Kwanza told you when he got into car that he had something that he did not want Maurice's friend to see?

A Yes.

[p.50]

Q You never said that to Officer Berrios, did you?

A I said everything to my attorneys and that is what happened.

Q The question is, you never said that to Officer Berrios, did you?

A Can you tell me what line is it in?

Q Well, it's not. I ask you to read –

A Well, I did not.

Q -- read the entire statement.

A Well, I did not told him that.

Q You said that Kwanza drove you to your friend's apartment or was going to drive you to your friend's apartment?

A Yes.

Q And where does your friend live?

A Harbor View.

Q What is the apartment number of your friend?

A I don't know the apartment number.

Q Isn't it easy to walk from where you were in the parking lot to your friend's apartment?

A Yes, it is easy. So, why would he want to tell me to drop me to my friend house? That was just a smart way to get in my panties.

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Q But you were in the car and you got into the car first, didn't you?

A I was always in the passenger side. I will never think my own first cousin will do anything like that to me.

Q Now, you testified to this jury that you got to Lionel Gas Station and you turned the steering wheel?

A Yes.

Q You never said that to Officer Berrios, did you?

A Well, actually, I didn't say a lot things because I was in pain.

Q And you are not in pain now?

A No, I'm not. It's been over a year.

Q Now, you told this jury that you saw a gun on Kwanza's lap at the Lionel Gas Station, right?

A Yes.

Q But you never said that to Officer Berrios, did you? Never mentioned about the gun in Kwanza's lap, did you?

A How can a person say as much as what happened if she is in pain and she don't know what to do; she's crying for her life?

MR. BRUSCH: Your Honor, may the

[p.52]

witness be directed to answer the question. It is a yes or no answer, your Honor.

THE COURT: Ms. Harvey.

THE WITNESS: No.

BY MR. BRUSCH:

Q And you also testified that Kwanza told you that do not touch steering wheel because he doesn't want to be stopped by the police because he has a gun in the car, right?

A Yes.

Q So, it's your testimony he doesn't want to be stopped by the police because he has a gun in the car and he has the gun right on his lap; that's your testimony?

A Repeat.

Q Is it your testimony that Kwanza's telling you he doesn't want to be stopped by the police because there is a gun in the car and at the same time he has a gun right on his lap?

A Yes.

Q According to your story, Kwanza stopped the car at the scenic road, correct?

A At the dead end.

Q Dead end. And then your story is that he asked you for sex?

[p.53]

A Yes.

Q And then you said no?

A "Because you are my cousin."

Q Yes. That's what your story is. And he told you to get –

MS. WILLIAMS: Objection, your Honor, as to commentary.

THE COURT: Just a minute.

MS. WILLIAMS: I was objecting to his commentary.

THE COURT: Sustained. only ask questions.

MR. BRUSCH: Very well, your Honor. I will move on. Thank you, your Honor.

BY MR. BRUSCH:

Q And then according to your story he told you to get out the car, right?

A If he told me to get out of the car?

Q That's right.

A Yes.

Q And you got out of the car?

A Yes.

Q And you said you were screaming and crying, crying, right?

A Yes.

[p.54]

Q And he came back and you got back into the car, right? That's your testimony?

A Yes.

Q You never told Officer Berrios that you were screaming and crying when you were at the car, did you?

A No.

Q your story is that Kwanza gets into the car and then he gets out and walks around the car, right?

A Repeat.

Q Your story that Kwanza -- you were in the car, you got into the car, right?

A Yes.

Q Kwanza is in the car, but then he gets out of the car, correct?

A Yes.

Q And walks around the passenger car?

A Yes.

Q And then he drags you out, you say, correct?

A Yes.

Q Now, that's when you told Officer Berrios that he struggled with you, threw you on the ground and raped you, right: but you now telling the jury that

[p.55]

that's a lie; that's not true?

A Repeat.

Q You told Officer Berrios at the hospital that Kwanza struggled with you, he threw you on the ground and raped you; but you now saying that's not true, right?

A Yes, I am saying that's not true.

Q Now, you also said that he had sex again -- he put you on the trunk of the car and had sex with you on the trunk of the car, is that right?

A Yes.

Q But you never said that to Officer Berrios, did you, that you had sex on the trunk of the car?

MS. WILLIAMS: Your Honor, at this point I'm going to object. She's already indicated that she did not tell Officer Berrios everything because of her condition at that time.

THE COURT: Overruled.

BY MR. BRUSCH:

Q You can read.

A (Witness complies.)

Q You never said that to Officer Berrios that you had sex with him on the trunk the car, did you?

[p.56]

A No.

Q And you on direct examination that he licked your vagina on the trunk of the car, is that right?

A Yes.

Q But in your statement to Officer Berrios you said he took you in the car and ate you, is that right?

A Yes.

Q But in your statement to Officer Berrios you said he took you in the car and ate you, is that right?

A Where you see that?

Q Well, on page 2, if you look at ten lines down, starts off, "S then threw –

MR. BRUSCH: May I approach the witness, your Honor?

THE COURT: Have you located it? Ms. Harvey, have you located it?

THE WITNESS: Yes.

THE COURT: You may ask your question.

BY MR. BRUSCH:

Q So, you told Officer Berrios that he threw you in the car, opened your legs and ate you, correct?

A Yes, I told him that, but that's not what happened.

Q So, that was not true?

A No.

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[p.70] MARTINEZ – DIRECT – WILLIAMS

THE COURT: Yes, what did you do?

THE WITNESS: I was speaking to her on the phone.

BY MS. WILLIAMS:

Q And after you spoke to on the phone, what did you do?

A Well, she called me and she was crying --

MR. BRUSCH: Objection, I move to strike, your Honor.

THE COURT: Ms. Martinez, please only answer the question that's asked of you.

THE WITNESS: Okay.

BY MS. WILLIAMS:

Q You had a conversation with your daughter?

A Yes.

Q That daughter being Chenae?

A Yes.

Q And at some point the conversation was over?

A Yes.

Q Okay, When the conversation was over, what did you do?

A I left the hospital. A coworker by the name of Sherry Gumbs took me to Harbor View.

Q Where in Harbor View?

[p.71]

A At my home in Harbor View.

Q And once you got to Harbor View, what did you do?

A Well, I was so weak after I got –

MR. BRUSCH: Objection that she was weak. Move to strike, your Honor.

THE COURT: The question is, what did you do, Ms Martinez?

THE WITNESS: Well, I was in the parking lot sitting in the car. And when I got there, Sherry Gumbs, being that I was so weak to go upstairs --

MR. BRUSCH: Objection; move to strike.

THE COURT: Sustained.

Ms. Martinez, we are not trying to trick you or anything or prevent you from telling the truth.

THE WITNESS: I am telling the truth.

THE COURT: But there are certain rules in the court that just answer the question that's asked without volunteering any information.

THE WITNESS: Okay. Okay.

BY MS. WILLIAMS:

[p.72]

Q Let me just ask again. What did you do?

A I sat in the car.

Q Where was this car?

A In the parking lot in Harbor View.

Q And what happened after you were sitting in the car? What did you do at that point?

A I sat in the car and Sherry Gumbs went upstairs to get my daughter.

Q Did Sherry Gumbs come back downstairs at some point?

A With my daughter.

Q Your daughter being Chenae?

A Yes.

Q And what happened when Chenae and Sherry Gumbs got back downstairs?

A We to go to the hospital.

Q What did you do once you got to the hospital?

A Well, when we got to the hospital, I went and I make a chart for Chenae to be seen by the triage nurse.

Q And what happened to Chenae? Do you know where Chenae went?

A In the hospital?

Q Right.

[p.73]

A She was in the triage room with me and the nurse.

Q At some point did you leave the hospital?

A No.

Q You stayed at the hospital for how long?

A For the whole period of time with Chenae.

Q Okay. And at some point that night, did you leave the hospital?

A I left -- well, I left with the police officer that night.

Q And where did you go with the police officer?

A To the AG's office.

Q And did you go anywhere else?

A Yes, I did. I had to go home with the police officer to retrieve Chenae's clothing.

Q And who was with you at that time?

A Officer Encarnacion.

Q And you retrieved Chenae's clothing?

A Yes.

Q Where was Chenae?

A She was present at Harbor View with me.

Q You mentioned earlier -- court's indulgence.

(Pause.)

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[p.94] DR. DASILVA – DIRECT – WILLIAMS

Q And what did you notice when you examined the pelvic area?

A I noticed there was blood coming out of the vagina and I also noticed that she had some tenderness around the area of the vagina.

Q When you say tenderness, what are you talking about?

A On touching the area of the vagina, she experienced pain. That is what I referred to as tenderness.

Q And other than tenderness, what else, if anything, did you observe? If you need to review your records, you may do so.

A There was also some redness around the area of the vagina.

MS. WILLIAMS: I have nothing further at this time.

MR. BRUSCH: Your Honor, at this time I am also requesting any statements or reports of this witness pursuant to Rule 26.2 of the Federal Rules of Criminal Procedure and Local Rules 7, your Honor, that has not been previously provided to me.

MS. WILLIAMS: All documents have been previously provided to counsel.

THE COURT: Very well. You may

[p.95]

proceed.

CROSS-EXAMINATION

BY MR. BRUSCH:

Q Now, doctor, you have before you, is it Government's Exhibit No. 5? What is that document, your medical records of Ms. Chenae? Look at the back the document.

A It says Plaintiff's Exhibit 5.

Q Plaintiff's Exhibit 5. Government's Exhibit 5. Now, and this is the emergency room records and also the triage report records, correct?

A Yes.

Q And the triage report records is what's done by the triage nurser is that correct?

A That's right.

Q And as a matter of fact, you rely on that triage nurse's observations in effecting your treatment, correct, in part?

A In part.

Q And isn't it a fact that the triage nurse stated that Ms. --

MS. WILLIAMS: Objection; beyond the scope of direct.

THE COURT: Overruled.

BY MR. BRUSCH:

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APPENDIX J

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CRIMINAL NO. 228/03

[Dated April 29, 2004]

THE GOVERNMENT OF THE VIRGIN ISLANDS,	)
Plaintiff.,	)
v.	)
KWANZA MARTINEZ,	)
Defendant.	)

CHARGES:
AGGRAVATED RAPE 1st DEGREE; AGGRAVATED RAPE 2ND DEGREE; KIDNAPPING FOR RAPE; UNAUTHORIZED POSS. OF A DANGEROUS WEAPON DURING THE COMM. OF A CRIME OF VIOLENCE; UNLAWFUL SEXUAL CONTACT 1ST DEGREE (2 COUNTS) UNAUTHORIZED POSSESSION OF A FIREARM

Thursday, April 29, 2004
Kingshill, St. Croix

The above-entitled action came on for JURY TRIAL before the Honorable EDGAR D. ROSS, Judge, in Courtroom Number 211.

SANDRA HALL
OFFICIAL COURT REPORTER
(340) 778-9750 Ext. 6701

***

[p.11] K. MARTINEZ – DIRECT – BRUSCH

A Chenae ask me to carry her to McDonald's.

Q And what happened next?

A On the way to McDonald's she ask me for some money.

Q What did you say?

A I ask her, "How much money?"

Q And what did she say?

A She said 5 to $600.

Q What did you say when she said that she needed 5 to $600?

A I told her, "I don't have it right now."

Q What did Chenae say to you?

A She ask me if that was a yes or no.

Q And what did you say?

A I told her, "I have a little money saved and I will see what I could do."

Q Did Chenae say anything to you after that?

A No.

Q Then what happened next?

A She ask me to pick her up around 8:45, 9:00 so we could talk a little bit more about it.

Q And what did you do after she said that to you?

A We headed back -- we headed to Mon Bijou. On the way to Mon Bijou, we went by a friend house of

[p.12]

mine, parked up for a while, we eat, headed back to Mon Bijou.

Q And at some point headed back to Harbor View?

A Yes.

Q Did Chenae say anything to you when headed back to Harbor View?

A She tell me don't forget to pick her up around 8:45, 9:00.

Q Did she say anything else other than pick her up around 8:45, 9:00?

A She told me, I would make it worth your while.

Q When she said she would make it worth your while, what do you think that to mean?

A To me that mean that she said she wanted to have sex.

Q Did Chenae ever flirt with you before?

A Yes.

Q Did you flirt with her before?

A No.

Q Now, did you take her back to Harbor view that afternoon?

A Yes.

Q On the evening of June 16th, 2003, where

[p.13]

were you?

A In Harbor View.

Q And why did you go to Harbor View?

A I went to Harbor View because she told me to pick her up that night around 8:45, 9:00.

Q What happened once you got to Harbor View?

A When I reach to Harbor View, me and her brother, Maurice, was hanging out downstairs.

Q What happened next?

A Then came Chenae, walk up, got into the car by the parking lot and she told me that she was ready to leave.

Q And what did you do?

A I then walked to the car, close my door, she close her door and we left.

Q And where did you go?

A We drove to the Salt River road and headed towards the Scenic Drive.

Q And when you got to the Scenic Drivel did you stop your car?

A When we reach to the scenic Drive, I parked; I [illegible] in the car. Chenae start to remove her own clothes.

Q And did she say anything to you when she started to remove her clothes?

[p.14]

A Yes.

Q What did she say?

A She say, we don't have all night because I want to get home before my mother reaches home from the movies.

Q What happened next?

A Well, when we were finished, we headed back to Harbor View.

Q Well, you say when you were finished. Did something happen when she removed her clothes?

A Yes.

Q What happened?

A She said -- she ask me how much money did I come up with.

Q Well, before she asked how much money you came up with, did something happen in the car after she removed her clothes?

A No.

Q So, she just removed her clothes, Mr. Martinez?

A She just remove her own clothes.

Q And then what happened?

A We had sex.

Q And where did you have sex?

A In the back seat.

[p.15]

Q And what happened after you had sex in the back seat?

A When we were finished, on the way back to Harbor View she asked me how much money did I come up with.

Q And what did you say to her?

A I told her, "I haven't come up with the money yet."

Q And what did she say to you?

A She got real upset and told me if I don't come up with the money, she is going to tell everybody that I rape her.

Q And what did you say?

A I tell her she must be crazy.

Q What happened next?

A Then we headed back to Harbor View.

Q And did you take her to Harbor View?

A Yes.

Q What happened once you got to Harbor View?

A She told me if I don't come up with the money soon that she would tell everybody that I rape her.

Q Did you take her home?

A Yes.

Q And who was home when you took her home?

[p.16]

A Me, Chenae and her brother.

Q What did you do when you got to Chenae's home, her apartment?

A We hang out for a while. Everything was normal. We was watching TV.

Q And did anything else happen that evening into Chenae apartment?

A Her mom came home.

Q And did her mom say anything to you?

A We had a conversation.

Q What happened after you left the Harbor View apartments?

A After I brought her back home?

Q Yes.

A I headed Frederiksted.

Q Did you take any food to anyone that evening?

A Yes, we did carry -- my aunt ask me to carry my cousin, Maurice, to carry some food to my uncle.

Q And did you do that?

A Yes.

Q And your aunt is Faye Martinez, correct?

A Yes, sir.

Q Did you ever get any money to Chenae?

[p.17]

A No.

Q After this incident, did you call Faye Martinez?

A Yes.

Q And what did you say to her?

A I told her that Chenae's not telling her the truth.

Q Did you say anything else to her?

A No.

Q After June 16th, 2003, after this day, did you call or speak to Dawn Callwood?

A No.

Q Mr. Martinez, on the evening of June 16th, 2003, did you tell Chenae Harvey that you were going to take her to a friend in Harbor View?

A No.

Q Did you drive her at a high rate of speed at any time --

MR. PONTEEN: Objection; leading.

MR. BRUSCH: Your Honor, I'm entitled to negate the testimony –

THE COURT: Sustained.

MR. BRUSCH: -- of a witness, your Honor, of the complainant, your Honor.

THE COURT: Overruled. Sorry.

[p.18]

BY MR. BRUSCH:

Q Did at any time you drive at a high rate of speed any time after you left Harbor View with Chenae?

A No.

Q Did Chenae ever tell you to stop and take her the fuck home?

A No sir.

Q Was Chenae at any time that evening crying?

A No, sir.

Q Did you have a gun in the glove compartment?

A No, sir.

Q Did you take out a gun out of the glove compartment and put it on your lap?

A No, sir.

Q Did Chenae ever turn the steering wheel at any time that evening?

A No, sir.

Q Did you ask Chenae to have sex with you?

A Excuse me, sir?

Q Did you ask Chenae to have sex with you?

A No, sir.

Q Did you leave Chenae at the scenic road

[p.19]

for five minutes and then returned?

A No, sir.

Q Did you fight with Chenae?

A No, sir.

Q Did you ever threaten to kill Chenae that evening?

A No, sir

Q Did you ever take her back to the back of the car and forced her to have sex with you?

A No.

Q Did you put a gun on the trunk of the car?

A No, sir.

Q Did you force her to have sex with you in the back seat of the car?

A No, sir.

Q Did you lick her vagina?

A No, sir.

Q Did you suck -- did she suck your bud?

A No, sir.

Q Did you force her to suck your bud?

A No, sir.

Q Did you ever tell Chenae that you would kill her if she told anyone?

A No, sir.

Q Mr. Martinez, did you use force or threats

[p.20]

or intimidation so that Chenae could have sex with you?

A No, sir.

Q Did you point a gun to her at any time?

A No, sir.

Q Did you take out a gun at any time?

A Excuse me, sir?

Q Did you take out a gun at any time from your car?

A No, sir.

Q Mr. Martinez, did you rape Chenae Harvey?

A No, sir.

Q Did you kidnap Chenae Harvey?

A No, sir.

Q Did you kidnap Chenae Harvey with the intent to rape Chenae Harvey?

A No, sir.

Q Did you possess any weapon?

A No, Sir.

Q Did you unlawfully have sexual contact with Chenae Harvey by putting your mouth to her vagina?

A No, sir.

Q Did you have unlawful sexual contact with Chenae Harvey by putting her mouth on your penis?

A No, sir.

Q Mr. Martinez, did you at any time use any

[p.21]

force of sort with Chenae Harvey when you had sex with her?

A No, sir.

Q Before you had sex with her?

A No, sir.

Q After you had sex with her?

A No, sir.

Q When she took off her clothes, did you understand that she consented and agreed to have sex?

A Excuse me?

Q When she took off her clothes, is it your understanding that she agreed to and consented to have sex with you?

MR. PONTEEN: Objection; leading.

A Yes, sir.

MR. PONTEEN: Move to strike; putting words in the witness's mouth.

THE COURT: Sustained.

BY MR. BRUSCH:

Q Did Chenae Harvey ever tell you to stop having sex with her?

A No, sir.

Q Did she ever push you off of her?

A No, sir.

MR. BRUSCH: No further questions.

[p.22] K. MARTINEZ – CROSS – PONTEEN

CROSS-EXAMINATION

BY MR. PONTEEN:

Q Good morning, Mr. Martinez.

A Morning, sir.

Q Mr, Martinez, isn't it true that you are a convicted felon?

A I don't understand what you mean.

Q Isn't it true that you were convicted in the Territorial Court for selling drugs?

A Yes, sir.

Q What kind of drugs did you sell?

MR. BRUSCH: Objection, your Honor. He can only ask if there was a conviction.

THE COURT: Sustained.

BY MR. PONTEEN:

Q What was your friend's name you went to Mon Bijou with, had some food with?

A Jamie.

Q And do you know where he lives?

A He stays in Mon Bijou and Mutual Home.

Q And did you tell your lawyer his name and where he lives so that –

MR. BRUSCH: Objection, your Honor.

THE COURT: Sustained.

BY MR. PONTEEN:

[p.23]

Q Did you make a statement to Officer Berrios about what you told us here today?

MR. BRUSCH: Objection. your Honor.

A Excuse me, sir?

THE COURT: Sustained.

BY MR. PONTEEN:

Q Did you give -- make a statement –

THE COURT: You don't have to answer.

BY MR. PONTEEN;

Q Was this the first time you took Chenae to McDonald's?

A No, sir.

Q She always asked you for money, 5, $600 when you take her to McDonald's?

A No, sir.

Q You accustomed to going to Ms. Faye Martinez's house and eat and drink and be part of the family, is that correct?

A Yes, sir.

Q And this time, according to your story, Chenae just decided she wants 5 or $600 from you?

A Yes, sir.

Q Did she tell you what she was going to do with it?

[p.24]

A No, sir.

Q Before that time, did Chenae ever demanded money from you?

A Excuse me, sir?

Q Did she ever demand 5 or $600 from you before?

A No, sir.

Q So, according to your story, this is the only time since you've known Chenae that she said, look, I need 5 or $600 from you and I am going to make it worth your while?

A Yes, sir.

Q Don't you think that that's kind of strange that Chenae would do that?

MR. BRUSCH: Objection, your Honor.

THE COURT: Sustained.

BY MR. PONTEEN:

Q Did you ask Chenae if she had some type of problem that she would need this 5 or $600?

A No, sir.

Q Did you tell Ms. Martinez that Chenae might be in some trouble and needed 5 or $600?

A No, sir.

Q Did you tell your mother that Chenae demanded 5 or $600 from you?

[p.25]

MR. BRUSCH: Objection, your Honor.

THE COURT: Overruled.

BY MR. PONTEEN:

Q Did you tell your mother that Chenae was trying to shake you down for 5 or $600?

MR. BRUSCH: Objection as to shake down.

THE COURT: Sustained.

BY MR. PONTEEN:

Q Did you tell your mother that Chenae demanded 5 or $600 from you and said she would make it worth your while?

A No, sir.

Q Did you tell anyone other than today that Chenae demanded 5 or $600 from you?

MR. BRUSCH: Objection, your Honor.

THE COURT: Overruled.

BY MR. PONTEEN:

Q Other than your attorney –

MR. BRUSCH; Objection, your Honor.

THE COURT: Sustained as to the attorney.

BY MR. PONTEEN:

Q Did you tell anyone –

MR. BRUSCH: Objection. May we

[p.26]

approach, your Honor?

THE COURT: You may.

(Counsel for all parties approached the bench and conferred with the Court, as follows:)

MR. BRUSCH: Your Honor, the defendant has a right not to say anything to anyone, your Honor; has a right to remain silent. He has a right to privilege against self-incrimination. He has a right not to say anything.

THE COURT: He has a right not to say anything to law enforcement officers, but -- as I see it, the object of the government's testimony is to indicate that the defendant recently made up the story.

MR. BRUSCH: Well, that may very well be so if that's their object. If they can get it in, they can't get it in through this kind of questioning. He has a right not to say anything to anyone.

THE COURT: I understand he has a right not to say anything to anyone, but they can ask him if he said it.

MR. BRUSCH: Your Honor, also if the Court is going to allow that, your Honor, it should be specified as to time -- well, I have stated my objections.

[p.27]

THE COURT: Yes.

(The proceedings had at the bench were concluded and this trial resumed, as follows:)

BY MR. PONTEEN:

Q Sir, did you tell anyone that Chenae demanded 5 to $600 from you?

A Excuse me, sir?

Q Did you tell anyone that Chenae demanded 5 to $600 from you?

A My attorney.

MR. BRUSCH: I continue my objections.

THE COURT: Yes.

BY MR. PONTEEN:

Q And you told us, your story, that you never flirted with Chenae before?

A Excuse me?

Q You told us here this morning that you never flirted with Chenae before?

A Not that I recall.

Q And you didn't flirt with Chenae before because she's your first cousin?

MR. BRUSCH: Note my objection.

THE COURT: Objection overruled.

BY MR. PONTEEN:

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[p.92] CLOSING ARGUMENT ON BEHALF OF GOVERNMENT

Attorney Williams -- but look, look down on page 2, line 10, what does it say there? Then she said, yes, I did give Officer Berrios that statement. So, while she's in pain, she told the officer some things. She didn't tell the officer everything. She told him some things. She

told him who did it and some of the things that that person did.

What we are being told here by Mr. Martinez is that this thing is really about 5 to $600. She agreed and then because I wouldn't pay up or said I had no money to pay up, that's why she is calling for rape because I didn't have the money. He agreed before, look, I didn't flirt with her and perhaps rightfully because, because that's my first cousin; but then all of a sudden for the first time, well, hey, take me to McDonald's; and by the way I need 5 to $600 and I will make it worth your while. Is this yes or no? What's it going to be? He says, well, look, I don't have that kind of money; but yet according to his story, well, she says be back here 8:45 so we can talk about this 5 to $600 some more.

This is not a case of some football player, some basketball player that the minor's gonna say, well, look, we are going to do this thing at a darkened road someplace in the middle of no where by

[p.93] CLOSING ARGUMENT ON BEHALF OF DEFENDANT

Carambola; and since I know that you have millions of dollars then you better pay me a couple millions or there is going to be a civil suit; or you better leave your wife and come to me, or your girlfriend and come to me. He wants us to believe that this is why; that for 5, $600 she now says give me the money or else.

I submit to you, using your common sense, your judgment in assessing the testimony for all the parties that the government will have met its burden. And

because we have met our burden, the fair and just verdict in this case is to find Mr. Kwanza Martinez guilty because he committed the act against this minor, this minor who happens to be his first cousin.

Attorney Williams will address you in a little while; Attorney Brusch will talk to you as well. And I submit to you that at the end of the day the fair and just verdict is guilty of all counts. Thank you very much.

THE COURT: You may proceed.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. BRUSCH: Good afternoon, your Honor. Good afternoon, ladies and gentlemen of the jury. My name is Stephen Brusch. I introduced myself to you earlier and it is my honor to represent

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[p.170] COURT'S INSTRUCTIONS

would be inflicted upon her by the defendant; and that these acts occurred on or about June 16th, 2003, on St. Croix, United States Virgin Islands.

Resistance prevented by fear means such fear that would have paralyzed the complainant's capacity to resist and undermine her will. Immediate, as used in the statute means present, instantly, right away; at once, without delay; not deferred by any interval of time, urgent. And great bodily harm means that injury

which creates a substantial risk of death or protracted loss or impairment of any bodily member or organ.

The term reasonable cause to believe means that cause and belief that a reasonable person would have given all the attending circumstances. You must find the defendant not guilty of Count 1 of the Information unless and until you find that the government has proven beyond a reasonable doubt, in addition to each and everyone of the other elements as identified and defined for you, the element that the defendant had a specific intent to have sexual intercourse with Chenae Harvey, by preventing the person's resistance by fear of immediate and great bodily harm, and the element that the defendant had the specific intent to commit rape as defined for you.

[p.171]

Specific intent, again, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

The defendant, Kwanza Martinez, is charged in Count 3 of the Information with kidnapping for rape. Under the laws of the Virgin Islands, it is an offense or a crime to abduct, take, or carry away any person by force or threat with the intent to commit rape.

Therefore, before you may find the defendant guilty of kidnapping for rape as charged in Count 3, you must find that the government has proven each of the following essential elements beyond a reasonable

doubt: That the defendant and no other person, did knowingly and intentionally and unlawfully abduct, take or carry away Chenae Harvey; that the defendant acted with a specific intent when he unlawfully abducted, took or carried away Chenae Harvey with the specific intent to commit rape; that these acts occurred on or about June 16th 2003 in St. Croix, United States Virgin Islands.

You must find the defendant not

[p.172]

guilty unless and until you find that the government has proven beyond a reasonable doubt, in addition to each and everyone the other elements that I have outlined for you, the element that the defendant kidnapped Chenae Harvey with a specific intent to commit rape. To kidnap means to carry away another person by force. Force means compulsion and violence directed to that end, and that end means the carrying away of the person.

The defendant cannot be convicted of kidnapping unless and until you find that the government has proven beyond a reasonable doubt that the alleged kidnapping of Chenae Harvey was of significant duration, and the alleged kidnapping of Chenae Harvey created a significant danger to Chenae Harvey independent of and different from the alleged rape.

The defendant, Kwanza Martinez, is charged in Count 4 of the Information with possession of a dangerous or deadly weapon during the commission of a crime of violence. Under the laws of the Virgin

Islands, it is an offense to bear, possess, transport, carry, or to have under one's proximate control a dangerous or deadly weapon during the commission or attempted commission of a crime of violence when the

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[p.188]

but your services are no longer required. We will not recess for jury deliberations.

(The Jury exited the courtroom at approximately 4:00 p.m.)

THE COURT: Exhibits 24 and 26, which pertain to the rifle will not be submitted to the jury.

MR. BRUSCH: Very well, your Honor.

THE COURT: I request that the attorneys at least review the exhibits that have been gathered by the clerk to make sure only those exhibits that pertain to the remaining charges are submitted, including Defendant's Exhibit 1.

MR. BRUSCH: Yes, your Honor. Thank you.

THE COURT: Recess for jury deliberations.

(This trial recessed at approximately 4:01 p.m. for jury deliberations and resumed at approximately 6:51 p.m., as follows:)

THE COURT: Ladies and gentlemen, I want to remind you that you are in a court of law and I know

that emotions will run high, but please remember that this is a court of law and try to control your emotions as the verdicts are read. If you don't

[p.189]

believe you can I ask that you leave the courtroom so that you don't disrupt the proceedings.

You may bring in the jury.

(The Jury enters the courtroom.)

THE COURT: Defendant and his counsel being present, the government's attorney being present, clerk may inquire.

THE CLERK: Ladies and gentlemen of the jury, have you reached a verdict?

FOREPERSON: Yes, we have.

THE CLERK: Will the foreperson please give the verdict to the marshal.

(Handing.)

THE COURT: You may return the verdict forms to the foreperson.

(Handing.)

THE CLERK: Will the foreperson please read the verdict.

THE COURT: Defendant please stand.

(Defendant stands.)

THE FOREPERSON: We, the jury, empanelled and sworn to determine the issues present in the above-entitled action find the defendant, Kwanza Martinez, on Count 1 of the Amended Information, to wit: Aggravated rape first degree, not guilty.

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We, the jury, empanelled and sworn to determine the issues present in the above-entitled action find the defendant, Kwanza Martinez, on Count 3 of the Amended Information, to wit: Kidnapping for rape, guilty.

We, the jury, empanelled and sworn to determine the issues present in the above-entitled action, find the defendant, Kwanza Martinez, on Count 4 of the Amended Information, to wit: Possession of a dangerous or deadly weapon during the commission of a crime of violence, not guilty.

We, the jury, empanelled and sworn to determine the issues present in the above-entitled action find the defendant, Kwanza Martinez, on Count 5 of the Amended Information, to wit; Unlawful sexual contact first degree, not guilty.

We, the jury, empanelled and sworn to determine the issues present in. the above-entitled action find the defendant, Kwanza Martinez, on Count 6 of the Amended Information, to wit: Unlawful sexual contact, first degree, not guilty.

MR. BRUSCH: Your Honor, if I may.

THE COURT: The Court will confirm that the verdicts are as read by the foreperson. Is there any request?